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Title VII v. Seniority: The Supreme Court Giveth and the Supreme Court Taketh Away

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TITLE VII V. SENIORITY: THE SUPREME COURT GIVETH AND THE SUPREME COURT TAKETH AWAY

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INTRODUCTION

> Imagine a race with two groups of runners of equal ability. Individuals differ in their running ability, but the average speed of the two groups is identical. Imagine that a handicapper gives each individual in one of the groups a heavy weight to carry. Some of those runners with weights would still run faster than some of those without weights, but on average, the handicapped group would fall farther and farther behind the group without the handicap.
>
> Now suppose that someone waves a magic wand and all of the weights vanish. Equal opportunity has been created. If the two groups are equal in their running ability, the gap between those who never carried weights and those who used to carry weights will cease to expand, but those who suffered the earlier discrimination will never catch up. If the economic baton can be handed on from generation to generation, the current effects of past discrimination can linger forever.[1]

Congress intended to solve the widespread problem of nonegalitarian hiring practices[2] by enacting title VII of the Civil Rights Act of 1964 (the Act),[3] during the apogee of the civil rights era. The Act represented a national commitment to end discrimination and to promote equality in employment.[4] The enactment of title VII spawned extensive commentary on the effect of facially neutral employment practices that perpetuated pre-Act discrimination.[5] Particular controversy arose concerning the application of seniority rules to blacks in jobs or seniority units from which they previously

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1. L. THUROW, THE ZERO-SUM SOCIETY 188 (1980).

2. 42 U.S.C. § 2000e-2 (1982) proscribes discrimination in employment based on race, color, religion, sex, or national origin. *See* Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 432 (1966) (reviewing circumstances that pressured Congress to enact title VII).

3. 42 U.S.C. § 2000e-2000e-15 (1970), *as amended by* The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e-2000e-17 (1982)). The effective date of title VII was July 2, 1965.

4. *See* Rachlin, *Title VII: Limitations and Qualifications*, 7 B.C. INDUS. & COM. L. REV. 473, 473 (1966) (stating clear purpose of title VII was equal employment opportunity for all Americans).

5. *See generally* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945 (1982); Jones, *Some Reflections on Title VII and the Civil Rights Act of 1964 at Twenty*, 36 MERCER L. REV. 813 (1985); Luthans, *The Impact of the Civil Rights Act on Employment Policies and Programs*, 19 Lab. L.J. 323 (1968); Rachlin, *supra* note 4; Comment, *The Distorted Adversarial Posture of Title VII Affirmative Action Challenges*, 128 U. PA. L. REV. 1543 (1980); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971) [hereinafter cited as *Developments—Title VII*].

had been excluded because of their race.[6]

The problem of accommodating seniority systems and title VII arose in times of economic distress, when employers had to decide who would lose the job: the white employee who was more senior, or the minority[7] employee whose lack of seniority was the result of historic discriminatory practices.[8] The Supreme Court recently gave this controversy new life in its decision in *Firefighters Local 1784 v. Stotts*.[9]

This Article will discuss the interplay between seniority systems and title VII. Part I will examine the conflict that arises from the

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6. For recent commentary, see generally Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268 (1969); Burke & Chase, *Resolving the Seniority/Minority Layoffs Conflict: An Employer-Targeted Approach*, 13 HARV. C.R.-C.L. L. REV. 81 (1978); Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969); Jones, *Title VII, Seniority, and the Supreme Court: Clarification or Retreat?*, 26 U. KAN. L. REV. 1 (1977); Marinelli, *Seniority Systems and Title VII*, 14 AKRON L. REV. 253 (1980); Comment, *Employment Discrimination — Seniority Systems Under Title VII*, 62 N.C.L. REV. 357 (1984); Note, *The Seniority System Exemption to Title VII of the Civil Rights Acts: The Impact of a New Barrier to Title VII Litigants*, 32 CLEV. ST. L. REV. 607 (1983-84) [hereinafter cited as Note, *The Seniority System Exemption*]; Note, *Title VII, Seniority Discrimination and the Incumbent Negro*, 80 HARV. L.J. 1260 (1967) [hereinafter cited as Note, *Incumbent Negro*]; Note, *Title VII v. Seniority: Ensuring Rights or Denying Rights?*, 26 HOW. L.J. 1485 (1983) [hereinafter cited as Note, *Title VII*]; Note, *Civil Rights — Seniority Systems*, 14 ST. MARY'S L.J. 95 (1982).

The illegality of the racially discriminatory impact of seniority systems predated the enactment of title VII. Prior to the enactment of title VII, courts deemed discrimination in seniority systems illegal under the duty of fair representation. *See* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 207 (1944) (enjoining enforcement of discriminatory collective bargaining agreement under duty of fair representation); Tunstall v. Brotherhood, 323 U.S. 210, 213 (1944) (duty of fair representation); *see also* Blumrosen, *supra* at 276, 285 n.40 (some holdings used duty of representation or violation of government contractual obligations to find pre-Act racial discrimination illegal).

7. The author uses the term "minority" to refer to the classes protected under title VII. Much of the case law deals with racial discrimination against blacks. The analysis, however, should be equally applicable to other minority groups, such as native Americans, hispanics, and women.

8. *See* Cooper & Sobol, *supra* note 6, at 1603 (discussing possible discriminatory effects of seniority systems).

9. 104 S. Ct. 2576 (1984). For recent commentary on *Stotts*, see generally Broderick, *Affirmative Action After Stotts: The Supreme Court's 1985 Term*, 15 N.C. CENTRAL L.J. 145 (1985); Fallon & Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1; FOX, *Title VII Class Actions: Settling-Up Is Hard to Do*, N.Y.U. THIRTY-SEVENTH ANNUAL NATIONAL CONFERENCE ON LABOR 17-1 (1984); Spiegelman, *Court-Ordered Hiring Quotas After Stotts: A Narrative on the Role of the Moralities of the Web and the Ladder in Employment Discrimination Doctrine*, 20 HARV. C.R.-C.L. L. REV. 339 (1985); Note, *The False Alarm of Firefighters Local Union No. 1784 v. Stotts*, 70 CORNELL L. REV. 991 (1985); Note, *"Last Hired, First Fired" — Rights Without Remedies: Firefighters v. Stotts*, 1983 DET. C.L. REV. 215; *Leading Cases of the 1983 Term*, 98 HARV. L. REV. 267 (1984). After this article went to the printer, the Supreme Court rendered its decision in *Wygant v. Jackson Board of Education*, 54 U.S.L.W. 4479 (1986), a case in which the Court addressed the constitutional aspects of affirmative action relief in a layoff context. *See infra* note 298 (framing the issue before the Supreme Court). The complexity of the opinion and the timing of its issuance vis a vis this article makes it impossible to analyze the case in detail in this article. *See Wygant v. Jackson Board of Education*, 54 U.S.L.W. 4479, 4492 n.7 (1986) (Marshall, J. concurring) (commenting on the intricate nature of the Court's decision); *see also infra* note 298 and accompanying text (evaluating initial impressions on the *Wygant* decision).

exemption of seniority systems from title VII.[10] Part II will explore judicial decisions that have addressed the seniority-title VII conflict. Part III will analyze and critique the recent decision of the Supreme Court in *Stotts*. Finally, Part IV will examine the continuing controversy between title VII and seniority systems and conclude that, since 1977, the Supreme Court has narrowed the relief available to claimants under title VII in a manner contrary to the purposes of the Act.

I. THE CONFLICT: SENIORITY AND TITLE VII

A. Seniority Systems

Employees earn seniority status based on length of service.[11] Individuals with greater seniority gain preferential treatment with respect to certain employment decisions.[12] Seniority is important because it gives employees a measure of their expected job security and plays a dominant role in making promotion decisions.[13]

Although for purposes of this Article it is unnecessary to explore the myriad of existing seniority systems, it is important to recognize that all seniority systems invariably affect the economic security of an employee.[14] In times of economic downturn, employees lose their jobs on a last-hired, first-fired basis.[15] An employee's security in employment is directly proportional to seniority accrued. Theoretically, seniority systems affect all employees in the same way regardless of race, gender, religion, or other similar criteria.[16] In

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10. 42 U.S.C. § 2000e-2(h) (1982). Section 703(h) of title VII exempts bona fide seniority systems. *Id.* § 703(h). This seniority exemption provision reads as follows:

> it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

Id.

11. Cooper & Sobol, *supra* note 6, at 1602. Employers measure seniority in several ways; by total term of employment, term of service in a department, term of service within a line of progression, or term of service in a particular job. *Id.*

12. *Id.*

13. Blumrosen, *supra* note 6, at 270. Commentators agree in their recognition of seniority's importance. *See* Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1534 (1962) (discussing role of seniority in labor movement); Jones, *supra* note 6, at 3 n.24 (noting union members deem seniority a "fundamental right").

14. Blumrosen, *supra* note 6, at 270.

15. For a discussion of the last-hired, first-fired system, see generally Sheeran, *Title VII and Layoffs Under the "Last-Hired, First-Fired" Seniority Rule*, 26 CASE W. RES. L. REV. 409 (1976).

16. Sheeran, *supra* note 15, at 413 n.24. The last-hired, first-fired seniority provision is a facially neutral, objective standard. *Developments—Title VII*, *supra* note 5, at 1111. However, facially neutral standards such as intelligence tests, educational requirements, and arrest records, can create some of the most persistent barriers to minorities in attaining equal opportunity. *See id.* at 1120 (alleging that neutral job qualifications effectively eliminate blacks

reality, however, such systems have a deleterious effect on the employment opportunities and expectations of minority groups.[17]

Seniority systems exist in most collective bargaining agreements and result from negotiations between unions and employers.[18] Although collective bargaining agreements represent a progressive move away from employers' unilateral control of the workplace, racially discriminatory[19] practices exist as easily in collectively bargained employment situations as in the totally employer-controlled environment.[20] Collectively bargained seniority systems merely reflect and perpetuate discriminatory employer hiring decisions.[21] Indeed, unions often actively discriminated in the workplace,[22] which led to conflicts between civil rights and labor movements.[23]

Challenges to the legality of racially discriminatory seniority systems predated the Civil Rights Act by over twenty years.[24] In 1944, the Supreme Court held that racially discriminatory provisions in a collectively bargained agreement violated a union's duty of fair representation.[25] Notwithstanding this declaration of illegality, racist practices prevailed in the workplace through the early 1960's.[26]

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from jobs). In such cases, courts experience difficulty in balancing the state's interest in improving the economic status of minorities, the interest in productivity, and the interest in fairness to majority workers. *Id.* at 1111 (questioning how courts strike balance of state's interest with interest in fairness).

17. Cooper & Sobol, *supra* note 6, at 1603. While an advantage of seniority is objectivity, the application of seniority rules to units that were formerly restricted to whites seriously undercuts the job security of newly admitted blacks. *Id.*

18. Judicial interpretation recognizes the value of seniority provisions in collective bargaining agreements. *See* Trans World Airlines Inc. v. Hardison, 432 U.S. 63, 79 (1977) (stating seniority provisions universally included in bargaining contracts); Humphrey v. Moore, 375 U.S. 335, 346 (1964) (holding seniority provisions of overriding importance in collective bargaining).

19. Discriminatory seniority systems will affect other protected classes as well, such as women. This is the assumption throughout this Article where instances of racial discrimination are discussed.

20. Blumrosen, *supra* note 6, at 271.

21. *See id.* at 271-73 (noting union role in workplace discrimination).

22. *Id.* at 273. Professor Blumrosen points out that employers used seniority rules to exclude minorities from the more respectable 'white jobs,' and relegate them to the less desirable, lower paying jobs. Minorities have not received the benefits from the institutional protection of trade unionism. *Id.*

23. *Id.* The civil rights movement viewed seniority not as a protection against arbitrary managerial action, but as an instrument of oppression, perpetuating the subordinate status of blacks. *Id.*

24. Prior to enactment of the Civil Rights Act, plaintiffs challenged the legality of racially discriminatory seniority systems under the Railway Labor Act. *See* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 199 (1944) (holding bargaining representative acting under authority of Railway Labor Act had duty of fair representation); Tunstal v. Brotherhood of Locomative Firemen & Enginemen, 323 U.S. 210, 211 (1944) (following holding of *Steele*).

25. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 204 (1944); *see also* Blumrosen, *supra* note 6, at 273 (indicating that trade unions did not fairly represent blacks); Jones, *supra* note 6, at 1 (noting that prior to title VII the seniority issue was analyzed under the fair representation doctrine).

26. Blumrosen, *supra* note 6, at 276. The situation remained substantially as it had been

Elimination of overt discrimination against minority workers in the employment environment required that active steps be taken to achieve an egalitarian work force.[27] Ending discrimination alone would do little to establish equality.[28] Something also had to be done about perpetuation of the effects of discriminatory seniority systems. The enactment of title VII of the Civil Rights Act of 1964, at least initially, provided a glimmer of hope that the discriminatory effects of seniority systems would be eradicated.[29]

B. Title VII

The Civil Rights Act of 1964[30] is considered the most important civil rights legislation of the century, and title VII, the antidiscrimination in employment section, its most important section.[31] Title VII prohibits private employers, employment agencies, and unions from discriminating in hiring, firing, compensation, and terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin.[32] The Act invalidates those practices that constitute different treatment based on one of the proscribed classifications,[33] as well as those practices which, although facially neutral, adversely affect the protected classes.[34] The proscription of such practices achieves the dual goals of eliminating pervasive social inequalities and promoting equal employment opportunities.

The Act, consistent with the broad purposes of title VII, provides courts with broad powers to fashion adequate remedies for discrimination. It specifically authorizes courts to award injunctive relief, monetary relief, affirmative action relief,[35] and attorney's fees.[36]

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during the time of overt racist practices. Minorities began to receive some of the lower paying, less secure "white" jobs as they became available. Employers and unions, however, refused to give employees seniority credit for time spent in Negro jobs. *Id.* at 277.

27. L. THUROW, *supra* note 1, at 189 (stating that elimination of current effects of past discrimination requires special privileges for those previously handicapped).

28. *See id.* (discussing current effects of past discrimination).

29. *See supra* note 5 and articles cited therein (recent commentary on title VII).

30. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

31. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, vii (2d ed. 1983).

32. 42 U.S.C. § 2000e-2 (1982). The Act was later amended to include public employers. The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 103, 111 (codified at 42 U.S.C. § 2000e-16 (1982)).

33. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) (finding title VII violation where employer refused to recruit, hire, transfer, or promote minorities on an equal basis with whites).

34. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (stating that title VII prohibits facially neutral practices which operate to "freeze" status quo of prior discriminatory employment practices).

35. 42 U.S.C. § 2000e-5(g) (1982).

36. 42 U.S.C. § 2000e-5(k) (1982).

Additionally, the Act permits courts to fashion any other equitable relief that the court deems appropriate.[37]

The provisions of the Act, ostensibly clear on their face, have produced widespread confusion.[38] Section 703(h), the seniority systems exemption,[39] in particular, has been the subject of much litigation as well as scholarly comment and speculation.[40] This section permits employers to use different standards of compensation and terms and conditions of employment pursuant to a bona fide seniority system.[41] As the only provision in the Act that deals with seniority, it is the source of the conflict between seniority rights and the Act's purpose of achieving equality in employment.

The seniority systems exemption was part of the Mansfield-Dirksen amendment.[42] The drafters crafted the exemption in response to expressions of fear that the Act, in its original form, might compromise seniority rights.[43] Specifically, proponents of the amendment feared that the Act would curtail the collective bargaining power of labor organizations and give preferential treatment in employment to newly hired blacks over more senior whites.[44] These concerns were the basis of substantial congressional debate.[45] Three memoranda exist from the Senate's consideration of title VII that addressed the issue of the Act's impact on seniority.[46]

First, the United States Department of Justice submitted a memorandum to Congress rebutting arguments that title VII would, *inter*

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37. 42 U.S.C. § 2000e-5(g) (1982).

38. *See generally* Vaas, *supra* note 2, at 444 (noting Congress' attempt to create detailed legislative history on title VII to guide courts).

39. 42 U.S.C. § 2000e-2(h) (1982). For text of § 703(h), see *supra* note 10.

40. *See supra* note 6 (citing articles concerning seniority systems exemption).

41. 42 U.S.C. § 2000e-2(h) (1982). The statute does not define a bona fide seniority system and a precise definition has never been supplied by the courts. *See supra* note 10 for text of § 703(h). In International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), the Supreme Court stated that a bona fide seniority system is one that applies equally to all races and ethnic groups, is rational and consistent with industry practice and National Labor Relations Board precedent, does not have its genesis in racial discrimination, and was negotiated and has been maintained free from any illegal purpose. *Id.* at 355-56.

42. 110 CONG. REC. 11,935-36.

43. *See* Cooper & Sobol, *supra* note 6, at 1608-10 (discussing debate over effect of original bill on seniority rights).

44. *See id.* at 1613 (discussing criticism of original bill on seniority issue by Senator Hill).

45. *See id.* at 1608-14 (discussing congressional debate on seniority systems exemption); *see also* International Bhd. of Teamsters v. United States, 431 U.S. 324, 352 (1977) (reading legislative history as authoritative indicator of purpose of § 703(h)). *But see* American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (disregarding legislative history information in favor of plain language of § 703(h)).

46. The memoranda included an interpretive memorandum the Department of Justice prepared at Senator Clark's request, 110 CONG. REC. 7207 (1964); an interpretive memorandum that Senators Clark and Case prepared, *id.* at 7212-15; and responses to questions that Senator Dirksen posed to Senator Clark. *Id.* at 7216-17.

alia, undermine existing seniority rights.[47] This memorandum, however, failed to resolve the conflict between existing discriminatory seniority systems and the Act's purpose of promoting equal employment opportunities. It asserted that the Act would have no impact on seniority rights that existed at the time the Act took effect,[48] but that the Act would invalidate a seniority rule that was itself discriminatory.[49]

A second memorandum submitted by Senators Clark and Case[50] provided conflicting information about the effect of title VII on seniority rights. Although the memorandum maintained that the Act would not have an impact on seniority rights,[51] it conceded that the Act would render illegal the use of seniority lists that employers maintained on a discriminatory basis prior to the Act.[52]

A final memorandum that Senator Clark incorporated into the record during floor debate stated, in substance, that the Act would not change employees' seniority status.[53] Indeed, in a last-hired, first-fired system, the memorandum stated, an employer could fire a minority worker because of lack of seniority, but not because of his race.[54] Such qualifications, however, create confusion regarding the effect of section 703(h) on seniority systems.

The late Senator Hubert Humphrey, who was a strong advocate of the Act, voiced his support for the seniority provision and noted that the section "merely clarified" the intent of the Act and did not interfere with its purpose.[55] He added that this provision "makes

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47. 110 CONG. REC. 7207 (1964). The memorandum explained that title VII would have no effect on existing seniority rights:

> . . . in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.

Id.

48. *Id.*

49. *Id.* For example, if a seniority rule required laying off minorities before white workers, title VII would invalidate the rule. *Id.*

50. *Id.* at 7212-13.

51. *Id.* at 7213. Senators Clark and Case argued that title VII was prospective in nature:

> . . . if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.

Id.

52. *Id.*

53. *Id.* at 7216-17.

54. *Id.* at 7217.

55. *Id.* at 12,723.

clear" that title VII only prohibits discrimination based on race, color, religion, sex, or national origin.[56] These statements provide no better guidance as to the section's true impact than any of the congressional memoranda.

Thus, the congressional memoranda and comments are not dispositive on the meaning of section 703(h). On first impression this legislative history appears to support a blanket protection of bona fide seniority systems. However, in the context of the Act, the purpose of which was to eradicate racial discrimination, section 703(h)'s perpetuation of a system that had its genesis in the midst of rampant racially discriminatory practices appears contradictory.[57]

II. JUDICIAL INTERPRETATIONS OF TITLE VII AND SENIORITY

Until 1977, courts interpreted title VII broadly, extending its reach to seniority systems that perpetuated the effects of past discrimination and construing the relief provisions so as to "make whole" the individuals and groups who experienced discrimination.[58] In 1977, however, the Supreme Court dramatically changed directions with its decision in *International Brotherhood of Teamsters v. United States.*[59] In *Teamsters*, the Court read expansively the seniority systems exemption, thus increasing the protection of seniority systems against title VII challenges and thereby limiting available relief.[60] After *Teamsters*, the Court continued to read the Act in a restrictive manner and to impose limitations on available remedies.[61] In 1984, the Supreme Court's decision in *Stotts*[62] furthered this trend and arguably emasculated title VII's allowance of affirma-

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56. *Id.*

57. For a detailed analysis of the interpretive problems of § 703(h), see Cooper & Sobol, *supra* note 6, at 1611-14. Cooper and Sobol point out that conclusions that many will draw from the language of title VII and its legislative history will undoubtedly reflect their approach to the abstract question of whether the application of seniority rules to newly hired minority workers in a formerly white-only seniority unit constitutes discrimination on grounds of race. Senator Clark's statements, for instance, would support those who insist that a neutrally applied seniority system is nondiscriminatory regardless of its context. *Id.* The legislative history and the language and structure of title VII, however, also support the conclusion that Clark's statements did not correctly reflect Congress' purposes with respect to the seniority issue. *Id.* at 1611.

58. *See generally infra* notes 64-99 and accompanying text (discussing pre-*Teamsters* decisions).

59. 431 U.S. 324 (1977).

60. *See id.* at 352-53 (holding that Congress intended § 703(h) to protect bona fide seniority systems even if employer's pre-Act discrimination worked to benefit of majority).

61. *See, e.g.*, United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977) (focusing on existence of present violation); East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 404 (1977) (past discriminatory practices not injurious to plaintiffs); *see also* Jones, *supra* note 6, at 37-44 (discussing *Teamsters* and its progeny).

62. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984).

tive action relief.[63]

*A. The Pre-*Teamsters *Era*

In 1968, in *Quarles v. Philip Morris, Inc.*,[64] a federal district court concluded that the reach of the Act included present effects of past discrimination in seniority systems.[65] The court reasoned that Congress did not intend to "freeze an entire generation" of minority employees into discriminatory patterns that existed before the Act.[66] The court found that the language of title VII did not support a restrictive reading of the Act's reach.[67] Fundamental to the court's opinion in *Quarles* was its finding that a system having its genesis in racial discrimination was not bona fide.[68]

A year after *Quarles*, the United States Court of Appeals for the Fifth Circuit in *Local 189 Papermakers & Paperworkers v. United States*[69] furthered the goal of promoting equality in employment. The court in *Papermakers* agreed with the decision in *Quarles* that section 703(h) protection of seniority systems did not extend to facially neutral systems that perpetuated the effects of past discrimination.[70] The court, however, balanced nonminorities' interests in their job expectations against minorities' interests in equal employment opportunities.[71] In balancing these interests, the court concluded that Congress did not intend to give preferential treatment to victims of discrimination by displacing incumbent employees.[72] The court thus limited future courts' authority to grant "fictional seniority" as

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63. *See infra* notes 272-78 and accompanying text (discussing effect of *Stotts* on title VII plaintiffs).

64. 279 F. Supp. 505 (E.D. Va. 1968).

65. *Id.* at 510.

66. *Id.* at 516. The relief that the court provided in *Quarles* allowed blacks, who had been hired prior to a certain date and slotted into undesirable jobs, to transfer and fill vacancies in more desirable departments transferring with them their total accumulated seniority. *Id.* at 520-21; *see also* Note, *Incumbent Negro*, *supra* note 6, *cited in* Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 511 (E.D. Va. 1968) (courts must adjust seniority systems so past discrimination does not continue harming black employees).

67. Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 515 (E.D. Va. 1968). The court stated that the plain language of the Act prohibits all racial discrimination affecting employment without excluding the present discriminatory effects of pre-Act discrimination. *Id.*

68. *Id.* at 517.

69. 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). *Papermakers* involved an employer who maintained a racially segregated work force until 1964. *Id.* at 983-84. In 1966, the employer integrated the progression lines on the basis of pay, which resulted in blacks with more total seniority, in terms of years of service, having less seniority than some whites with fewer years of service. *Id.*

70. *Id.* at 982-83. The court held that the employer's job seniority system "was unlawful because by carrying forward the effects of former discriminatory practices the system resulted in present and future discrimination." *Id.*

71. *Id.*

72. *Id.* at 995.

relief in title VII actions.[73]

Papermakers, thus, represented a middle course. In adopting the "rightful place" interpretation, the court prohibited employers from filling future vacancies on the basis of seniority systems that locked in prior racial classifications, and allowed a black to be assigned to a position only once a vacancy occurred.[74] The court, however, rejected the "freedom now" interpretation, which would permit the "bumping" of white workers from their presently held jobs.[75] The court also rejected the "status quo" approach which would require only the termination of discrimination without requiring corrective action with respect to prior discrimination.[76] The court held that its approach served the purpose of the Act and was true to its legislative history.[77] Yet such an approach forced victims of discrimination to remain in their inferior positions until vacancies occurred.

Despite the court's moderate retreat in *Papermakers*, title VII was in its heyday. In 1971 the Supreme Court decided *Griggs v. Duke Power Company*,[78] a landmark case liberally interpreting and expanding title VII's coverage in an effort to follow the revolutionary spirit of the Act.[79] Indeed, one commentator called *Griggs* "the most important decision in employment discrimination law."[80] In its decision in *Griggs*, the Court applied the "disparate impact" theory of discrimination, which invalidated facially neutral practices that had a disproportionate and deleterious effect on the protected

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73. *Id.*

74. *Id.* at 988. By fashioning relief in this manner the court protected the interests of whites by not letting minorities displace them. This "rightful place" theory of relief originated from a student Note. *See id.* at 988 n.11 (citing Note, *Incumbent Negro, supra* note 6, at 1268). With this theory the court charted a course between the more liberal "freedom now" theory which entailed the displacement of white incumbents by minority workers and the "status quo" theory which merely required termination of discrimination. *See id.* at 988 (describing various forms of relief court considered).

75. *Id.* Other courts followed the *Papermakers* approach adopting the "rightful place" and rejecting the "freedom now" doctrine; *see, e.g.*, Patterson v. American Tobacco Co., 535 F.2d 257, 267-68 (4th Cir.) (reversing district court's acceptance of "freedom now" doctrine), *cert. denied*, 429 U.S. 920 (1976); EEOC v. Detroit Edison Co., 515 F.2d 301, 316 (6th Cir. 1975) (adopting "rightful place" doctrine); United States v. N.L. Indus. Inc., 479 F.2d 354, 374-75 (6th Cir. 1973) (adopting "rightful place" doctrine); United States v. Chesapeake & Ohio Rys., 471 F.2d 582, 593 (4th Cir. 1972) (holding victim of discrimination need not forfeit seniority when transferred to position denied him because of discrimination).

76. Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 988 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

77. *Id.*

78. 401 U.S. 424 (1971). Although this case did not concern seniority rights, it is important because it expanded the reach of the Act in a way critical to the evaluation of the seniority-title VII conflict.

79. *See* Bartholet, *supra* note 5, at 951-52 (discussing broad effect of Court's decision in *Griggs* on antidiscrimination principle).

80. B. SCHLEI & P. GROSSMAN, *supra* note 31, at 5.

classes.[81] The Court recognized that employers may violate the spirit of the Act even when they employ practices that, on their face, do not evince any differential treatment of minorities.[82]

The Court's mandate in *Griggs* was overwhelmingly simple. It stated that the objective of Congress in the enactment of title VII was to achieve equal employment opportunities and remove discriminatory barriers.[83] Under the Act, the Court held employers cannot maintain facially neutral practices, procedures, or tests if they "operate to 'freeze' the status quo of prior discriminatory employment practices."[84] This holding significantly extended the reach of title VII.[85] After the Court's decision in *Griggs*, an employer's promulgation of facially neutral policies and lack of bad faith could not overcome a showing that its policies disfavored a protected group.[86]

In *Franks v. Bowman Transportation Co.*,[87] the Court held that the Act allowed the award of class-based seniority relief to identifiable victims of illegal hiring discrimination.[88] The Court in *Franks*, as in *Papermakers*, balanced the interests of minority and nonminority employees.[89] In doing so, it recognized that awarding retroactive seniority to victims of discrimination could have a negative effect on the status of incumbent employees. The Court concluded, however, that failure to award such relief would frustrate the remedial objectives of the Act.[90] The Court noted that Congress, in furtherance of a strong public policy interest,[91] may modify employee expectations arising from a seniority system agreement, and held that nothing either in the language of the Act or in its legislative history evinced any intent on the part of Congress to prohibit the award of retroactive seniority to victims of discrimination.[92] This remedy permitted

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81. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).
82. *Id.* at 431.
83. *Id.* at 429-30.
84. *Id.* at 430.
85. *See* Bartholet, *supra* note 5, at 951 (stating that Court in *Griggs* radically expanded antidiscrimination principle).
86. In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), for example, the Supreme Court upheld the propriety of back-pay relief to minority plaintiffs who were "locked into" lower paying job classifications by an employer's seniority system and program of employment testing. *Id.* at 418-22. The Court held that an employer's absence of bad faith was insufficient reason for denying back pay and concluded that to condition the availability of such relief of an employer's motivation was inconsistent with the Act and its legislative history. *Id.* at 422-23.
87. 424 U.S. 747 (1976).
88. *Id.* at 779.
89. *Id.* at 774-75.
90. *Id.* at 775.
91. *Id.* at 778.
92. *Id.* at 774-75.

victims of discrimination to obtain their deserved status in the hierarchy of seniority.[93]

After the Court's decision in *Franks*, employers could no longer invoke section 703(h) to protect a seniority system once an illegal employment practice had occurred.[94] The Court's decision established that courts could no longer deny retroactive seniority to victims of discrimination on the basis of a possible adverse impact on other employees,[95] as long as the relief granted furthered the objectives of title VII.[96]

Justices Powell and Rehnquist wrote separate opinions in *Franks* objecting to an award of relief that would have an adverse impact on "perfectly innocent employees."[97] Both Justices insisted that the rights of such employees should be weighed heavily in a balancing of their rights against the rights of victims of discrimination.[98] These objections became increasingly important as the decade progressed. Indeed, the objections became the majority view as the tide shifted in 1977 with the Supreme Court's decision in *International Brotherhood of Teamsters v. United States*.[99]

B. International Brotherhood of Teamsters v. United States: *The Turning Point*

In *International Brotherhood of Teamsters v. United States*,[100] the Supreme Court began to expand the scope of section 703(h)'s protection of seniority systems and to focus on the protection of seniority rights of nonminority employees. In the *Teamsters* decision, the Court declared lawful, under title VII, a seniority system that perpetuated the effects of pre-Act discrimination.[101] The majority reasoned that, although under *Griggs* a facially neutral employment practice with a disparate impact on a protected class was illegal under title VII, section 703(h) provided an exemption for bona fide seniority systems.[102] The Court agreed that the employer had en-

93. *Id.* at 768.
94. *Id.* at 757.
95. *Id.* (quoting United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971)) (declining to deny relief based on effect on majority employees).
96. *See* B. SCHLEI & P. GROSSMAN, *supra* note 31, at 79 (noting that Supreme Court in *Franks* clearly indicated that title VII's legislative policy of making whole victims of discrimination overrides the interests of majority employees).
97. Franks v. Bowman Transp. Co., 424 U.S. 747, 781, 789 (1976) (dissenting opinions of Powell, J. and Rehnquist, J).
98. *Id.* at 790.
99. 431 U.S. 324 (1977).
100. *Id.*
101. *Id.* at 353-54.
102. *Id.*

gaged in a pattern and practice of employment discrimination against minorities;[103] the evidence showed pervasive statistical disparities in employment of minorities and whites as well as specific instances of discrimination.[104] The Court concluded that, in the absence of the section 703(h) exemption, the Court's decision in *Griggs* would have invalidated the seniority system in *Teamsters*.[105] In enacting section 703(h), however, the Court explained that Congress granted a measure of immunity to seniority systems, even where such systems perpetuate the effects of prior discrimination.[106]

Thus, the Court in *Teamsters* overruled a decade of legal precedent under *Quarles*, *Papermakers*, and their progeny.[107] The Court concluded that it was not the intent of Congress to render illegal nonminority employees' exercise of vested seniority rights, even if this exercise had an impact on the rights of victims of discrimination.[108] The Court dismissed the Government's contention that to uphold as bona fide a system that perpetuated pre-Act discrimination would "disembowel" section 703(h).[109] As a result of the Court's decision in *Teamsters*, a title VII claimant must establish actual intent to discriminate as a prerequisite to a finding that a seniority system violates the Act.[110]

Although the Court did not disturb the holding in *Franks* that retroactive seniority is a viable form of relief in title VII actions,[111] its holding in *Teamsters* that a seniority system with a discriminatory effect was lawful under section 703(h) severely limited the retroactive seniority relief available to victims of unlawful hiring practices. It precluded an award of retroactive seniority to persons laid off pursuant to the routine operation of a bona fide seniority system, even if such layoffs perpetuated past discrimination.[112]

Chronologically, *Teamsters* demarcates the Supreme Court's shift

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103. *Id.* at 337-43.
104. *Id.*
105. *Id.* at 349.
106. *Id.* at 350-51.
107. *See id.* at 378-80 (Marshall, J., dissenting) (noting that Court overturned over 30 cases from six courts of appeals concerning scope of title VII).
108. *Id.* at 352-54. The Court stated that Congress did not intend to disallow "the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act." *Id.* at 353.
109. *Id.* at 353.
110. *Id.* at 335 & n.15. The Court made clear that it was operating under a disparate treatment theory as opposed to a disparate impact theory. *Id.* Disparate treatment requires proof of intent whereas disparate impact involves facially neutral employment practices that fall more harshly on one group than another. *Id.* at 335 n.15.
111. *Id.* at 347.
112. *See id.* at 378 (Marshall, J., dissenting) (arguing that the Act invalidated all practices that perpetuated effects of past discrimination).

in perspective. In the preceding decade, starting with *Quarles* and culminating with *Franks*, the Court focused on the rights of minorities to achieve the congressional mandate for equal employment opportunities.[113] The goal was equality, so that minorities could attain their "rightful place" when a vacancy became available.[114] Although courts considered the rights of white incumbents and would not bump them to give preferential treatment to minorities, courts recognized that incumbents' interests might have to "bend" in the effort to make minority group members whole.[115]

The Court in *Teamsters*, however, made it more arduous to obtain equal employment opportunities. The legalization of systems that perpetuated the effects of past discrimination created an unpalatable situation, permanently handicapping victims of discrimination. The cases that followed *Teamsters* continued to impose this result, as the Court moved steadily towards striking a balance in favor of collective bargaining at the expense of title VII's equal employment opportunity goals.

C. *The Post-*Teamsters *Era*

In *United Air Lines Inc. v. Evans*,[116] the Court extended the scope of section 703(h)'s protection of seniority systems. The Court reiterated that section 703(h) and labor policy precluded invalidation of a facially neutral seniority system, regardless of its discriminatory effects.[117] In its decision in *Evans*, the Court held that post-Act discrimination, which was not made the subject of a timely charge, was "the legal equivalent of a discriminatory act which occurred before the statute was passed."[118] The Court's language in *Evans* changed dramatically from its language in *Franks*, thereby greatly expanding the protection afforded seniority systems under section 703(h).[119]

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113. *See supra* notes 64-68 and 87-99 and accompanying text (discussing *Quarles* and *Franks*).

114. *See supra* notes 74-75 (discussing courts' acceptance of "rightful place" doctrine).

115. *Id.*

116. 431 U.S. 553 (1977). In *Evans*, the claimant was a woman who had been forced to resign from her job at the time of her marriage. *Id.* at 554. In 1972, after a finding that the no-marriage rule violated title VII, her employer rehired her. *Id.* at 555. However, she received no seniority credit for the time that she had served with the employer prior to the wrongfully forced resignation. The Supreme Court held that she was treated the same as males who were hired after her resignation and prior to her rehire. *Id.* at 557-58. The Court also ruled that although the seniority system perpetuated the effects of past discrimination, the plaintiff failed to allege that the seniority system was discriminatory. *Id.*

117. *Id.* at 560.

118. *Id.* at 558.

119. *Compare id.* at 560 (stating that § 703(h) permits attacks on presently discriminatory seniority systems) *with* Franks v. Bowman Transp. Co., 495 F.2d 398, 417 (5th Cir. 1974) (stating that discrimination that occurs in past hiring procedures does not affect bona fides of seniority system).

In *Transworld Airlines, Inc. v. Hardison,*[120] the Court once again stressed the seniority rights of nonminorities. The Court refused to deprive a nonminority employee of vested seniority rights under a collective bargaining agreement at the expense of a title VII claimant.[121] The Court based its deference to contractual rights of majority employees on the national labor policy that favors collective bargaining as a means of effecting workable and enforceable agreements between management and labor.[122] This reasoning radically shifted the Court's emphasis from its earlier focus on the public policy aims of title VII to contractual rights of majority employees.

Two years later the Court decided that affirmative action programs are permissible under title VII, even if they conflict with the seniority rights of nonminorities. In *United Steelworkers v. Weber,*[123] the Court held that title VII did not prohibit voluntary race-conscious affirmative action plans that were the product of collective bargaining between an employer and a union.[124] The plan in question attempted to ameliorate the significant underrepresentation of blacks that existed in the employer's work force, which was an "arguable violation of Title VII."[125] Two factors were important to the Court in *Weber.* First, the affirmative action program was the product of a collective bargaining agreement.[126] Second, the program was temporary and was designed to eliminate a possible violation of the Act.[127]

Still, the Court in *Weber* paid great attention to the rights of nonminorities.[128] The majority found the plan acceptable because it did not unnecessarily impinge on the interests of the white employees.[129] The plan sufficiently protected the rights of the majority group because it neither required the discharge and replacement of

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120. 432 U.S. 63 (1977).

121. *Id.* at 80-81. This case did not involve discrimination based on race. The Court held that an employer should not be required to circumvent its seniority system to force a senior employee to relieve a junior employee on religious holidays. *Id.* Thus, the case is relevant because the majority group's contractual interests prevailed over the social goals of the legislation. *Id.*

122. *Id.* at 79.

123. 443 U.S. 193 (1979).

124. *Id.* at 197. The Court in *Weber* held, against the challenge of a white worker, that title VII permitted a private sector voluntary affirmative action program aimed at equal employment opportunity. *Id.* At issue in *Weber* was a collective bargaining agreement that established training programs for the purpose of teaching unskilled production workers the skills of craft workers. The program reserved 50% of the openings for blacks. *Id.*

125. *Id.* at 211 (Blackmun, J., concurring).

126. *Id.* at 197.

127. *Id.*

128. *Id.* at 208.

129. *Id.*

whites by blacks,[130] nor absolutely prevented whites from advancing.[131] The plan was merely a temporary measure that did not attempt to racially balance the work force; rather it was designed to eliminate an existing racial imbalance.[132] Notwithstanding the Court majority's view that the plan sufficiently protected the rights of white employees, Justices Burger and Rehnquist dissented because the plan allowed the employer to make employment decisions on the basis of race.[133] They insisted that, because the Act mandated color blindness in all employment decisions, the agreement in question discriminated on the basis of race in violation of sections 703(a) and (d).[134]

In *Pullman-Standard v. Swint*,[135] the Supreme Court reiterated the *Teamsters* standard, stating that section 703(h) protects a seniority system unless the plaintiff proves an intent to discriminate.[136] The Court in *Swint* stated that section 703(h) protects a seniority system even if the system perpetuates the effects of pre-Act discrimination.[137] Between the *Teamsters* and the *Swint* decisions, therefore, the Supreme Court eviscerated its previous decisions that applied a disparate impact analysis to seniority system challenges under title VII.[138]

The Court in *American Tobacco Co. v. Patterson*[139] extended section

130. *Id.*

131. *Id.* Half of the trainees admitted to the challenged program were white. *Id.*

132. *Id.* The Supreme Court in *Weber* fashioned a narrow holding that did not delineate between permissible and impermissible affirmative action plans. The Court merely held that the particular plan at issue was permissible because, like the Act, it attempted to eradicate racial segregation and because the scheme did not unnecessarily affect the rights of white employees. *Id.* Consequently, the Court left unsettled the question of whether title VII prohibited seniority overrides pursuant to policies designed to protect a racial/gender balance during layoffs.

133. *Id.* at 254. The dissenting justices argued that "in passing title VII, Congress outlawed *all* racial discrimination." *Id.* (emphasis added).

134. *Id.* at 253.

135. 456 U.S. 273 (1982).

136. *Id.* at 289. In a challenge by black employees to a seniority system, the district court in *Swint* found that the application of the seniority system fell under § 703(h) protection because it did not result from an intention to discriminate. *Id.* at 275. Finding that the facts demonstrated an intention to discriminate, the court of appeals reversed. *Id.* The Supreme Court, finding error in the court of appeals' analysis, reversed the judgment. *Id.* at 276. The petitioners contended that pursuant to FED. R. CIV. P. 52, a district court's factual findings could not be set aside unless they were "clearly erroneous." *Id.* at 277. The Supreme Court agreed and noted that the court of appeals had made its own findings of fact. *Id.* at 283. The Court concluded that the question of intent to discriminate was a question of fact to be decided by the fact finder and the appellate court must accept the district court finding unless clearly erroneous. *Id.* at 287.

137. *Id.* at 277. Indeed, the Court underscored its position by stating that discriminatory intent meant actual motive and "not a legal presumption to be drawn from a factual showing of something less than actual motive." *Id.* at 289-90.

138. *See supra* notes 64-98 and accompanying text (describing pre-*Teamsters* cases applying disparate impact analysis).

139. 456 U.S. 63 (1982).

703(h)'s protection of seniority systems beyond the holdings in *Teamsters* and *Evans*.[140] In *Patterson*, the Court ruled that section 703(h) protected bona fide seniority systems created after the passage of the Act.[141] The Court stated that Congress did not intend to distinguish between seniority systems adopted before and after the Act.[142]

In *Patterson*, the Court rejected the Equal Employment Opportunity Commission's (the EEOC) position. The EEOC urged the Court to construe the *Teamsters* and *Evans* decisions narrowly to protect only pre-Act bona fide seniority systems that were neither created nor maintained with an intent to discriminate.[143] The majority in *Patterson* found this position untenable because "the EEOC's reading of section 703(h) would make it illegal to adopt, and in practice to apply, seniority systems that fall within the class of systems protected by the provision."[144] The majority in *Patterson*, however, upheld an award of retroactive seniority even though it recognized that such an award might conflict with the statements in the legislative history cited by the EEOC that title VII would not affect seniority rights. The Court concluded, however, that Congress intended title VII to have a minimal impact on seniority.[145]

Dissenting in *Patterson*, Justices Brennan, Marshall, and Blackmun urged that the majority's extension of section 703(h)'s scope of protection was inconsistent with the statute.[146] They believed that Congress did not intend to protect "new rights that are the by-product of discrimination."[147] The dissent concluded that such post-Act systems should be subject to the disparate impact analysis set forth in *Griggs*.[148] Justice Stevens, separately dissenting, agreed with this position and argued that "a seniority system that is unlawful at the time it is adopted cannot be 'bona fide' within the meaning of section 703(h)."[149]

The Court reiterated in *Patterson* its rejection in *Teamsters* of the

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140. *Id.* at 75-77. *see supra* notes 99-112 and accompanying text (discussing holding in *Teamsters* in which Court protected seniority systems created prior to passage of title VII); notes 116-19 and accompanying text (discussing holding in *Evans* in which court protected post-Act practices that, due to untimely nature of charge, would be treated as if they occurred prior to passage of Act).

141. American Tobacco Co. v. Patterson, 456 U.S. 63, 77 (1982).

142. *Id.* at 75-76 (citing to *Teamsters*, *Evans*, and legislative history as support for conclusion).

143. *Id.* at 73-74.

144. *Id.* at 71.

145. *Id.* at 74 n.15.

146. *Id.* at 77 (Brennan, J., dissenting).

147. *Id.* at 78.

148. *Id.* at 86.

149. *Id.* at 87 (footnotes omitted).

Quarles ruling that the Act applied to present effects of pre-Act practices.[150] The Court also extended *Teamsters* by holding that section 703(h) insulated a bona fide seniority system even if it was created after the Act's passage.[151] The Court's requirement in *Patterson* of proof of intention to discriminate for the invalidation of a seniority system undermined the Court's holding in *Griggs* that the Act extends to practices that are discriminatory in operation.[152]

Minority employees' prospects brightened momentarily in 1982. In *Zipes v. Transworld Airways, Inc.*,[153] the Court considered whether to allow an award of retroactive seniority contrary to a collective bargaining agreement when there was no finding that the union had discriminated illegally.[154] In an opinion authored by Justice White, the Court upheld the propriety under title VII of an award of retroactive seniority.[155] In particular, the Court held that the finding that the union had not discriminated did not interfere with an award of retroactive seniority relief once the Court had found that the employer had discriminated.[156] In addition, the Court concluded that section 706(g) of the Act permitted class-based seniority relief because it furthered the Act's goals of making whole victims of discrimination.[157]

In the same year, however, the Court dramatically cut back on a discriminatee's rights to retroactive seniority. Although the Court in *Ford Motor Co. v. EEOC*[158] did not address directly the judiciary's power to award retroactive seniority relief, it stated that an employer charged with discrimination in hiring could toll the continuing accrual of back pay liability under section 706(g) by unconditionally offering the claimant the denied job even if the claimant did not accept the offer.[159] In an opinion which contains

150. *Id.* at 76.

151. *See id.* (stating § 703(h) made no distinction between seniority systems adopted prior to effective date of Act and those adopted after).

152. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). The Court in *Griggs* had held that title VII proscribes overt discrimination as well as "practices that are fair in form, but discriminatory in operation." *Id*; *see also supra* notes 68 and 70 and accompanying text (discussing findings in *Quarles* and *Papermaker* that seniority system with origins in racial discrimination not bona fide).

153. 455 U.S. 385 (1982).

154. *Id.* at 387.

155. *Id.* at 400. The Court faced the issue of retroactive seniority in the context of female flight attendants who had been grounded illegally after becoming mothers, while their male counterparts, who had become fathers, had been permitted to continue to fly. *Id.* at 388. The Court's holding gave hope to title VII advocates that the equal employment goals of the Act were still alive. *Id.* at 400.

156. *Id.* at 400.

157. *Id.* at 399-400; *see infra* note 227 for the text of § 706(g).

158. 458 U.S. 219 (1982).

159. *Id.* at 229-30.

by far the strongest language in support of the rights of nonminority employees, the majority of the Court held that an offer of retroactive seniority was not necessary to toll back pay liability.[160] The Court reasoned that tolling back pay liability, by merely offering an alleged discriminatee the position originally sought, would encourage employers to hire title VII claimants and would thus serve the make-whole objective of the Act.[161] The Court concluded that to require an offer of retroactive seniority would not encourage employers' voluntary compliance with the Act because it would render the decision to hire a title VII claimant more costly than the decision to hire another applicant.[162] The majority felt that a job offer served the make-whole objective of the Act without creating the labor unrest and loss of productivity that would result from giving claimants seniority over incumbents who earned their places through work on the job.[163]

Not unexpectedly, a strong dissent criticized the majority in *Ford* for ignoring the equitable presumption of full restitution established in *Franks*.[164] The dissenters argued that the job offer did not achieve the make-whole objective of the Act.[165] They objected to the majority's holding as both unnecessary and unfair, and strongly criticized the decision as authorizing employers to make "cheap offers" to the victims of their past discrimination.[166]

In 1983, the Supreme Court addressed a conflict between a conciliation agreement, to which the employer and the EEOC were parties,[167] and a seniority provision in a collective bargaining

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160. *Id.* at 241.

161. *Id.* at 228-29.

162. *Id.* at 229.

163. *Id.* Although *Ford* involved the avoidance of title VII liability prior to an adjudication of illegal discrimination, the Court in *Ford* moved towards a reversal of the presumption in previous cases of the necessity of back pay or seniority relief for victims of discrimination. *See* Note, *Diluting Relief Under Title VII: Ford Motor Company v. EEOC—Employment Offer Absent Retroactive Seniority Effective in Tolling Back Pay*, 32 CATH. U.L. REV. 665, 688 (1983) (noting Court interpreted title VII's remedial provisions to require discrimination victims to abandon seniority rights when accepting positions originally denied them).

164. *Id.* at 243 (Blackmun, J., dissenting). The dissenters felt that the majority opinion was a "wide-ranging advisory ruling" that stretched far beyond the confines of the case. *Id.* at 241. The Court's rule, the dissent argued, gave employers who engaged in unlawful hiring practices a unilateral device to cut off their back pay liability to the victims of their past discrimination. *Id.* at 241-42.

165. *Id.* at 250.

166. *Id.* at 249-50. The dissent further stated that employers could now unilaterally terminate their backpay liability by extending to their discrimination victims offers they could not reasonably accept. *Id.*

167. W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber Cork, Linoleum & Plastic Workers, 461 U.S. 757, 759 (1983). The conciliation agreement was entered into between the Equal Employment Oportunity Commission (the EEOC) and the employer in 1973, pursuant to § 706(b) of title VII, 42 U.S.C. § 2000e-5(b) (1982). After a lengthy EEOC investigation, the Director determined that there was reasonable cause to believe that W.R. Grace

agreement.[168] In *W.R. Grace & Co. v. Local 759, International Union of United Rubber, Cork, Linoleum & Plastic Workers*,[169] the Court addressed the enforceability of an arbitral award for back-pay damages issued against petitioner under its collective bargaining agreement for layoffs that were effected pursuant to the conciliation agreement.[170] The Court noted that the company had committed itself voluntarily to two conflicting contractual obligations.[171] The Court concluded that this dilemma was of the company's own making, and therefore, refused to absolve the company from liability under its collective bargaining agreement.[172]

The Court also considered the importance, as a matter of public policy, of voluntary compliance with title VII.[173] The employer in this case voluntarily undertook obligations pursuant to a bargaining agreement and it was not a violation of public policy to hold the employer to those obligations.[174] The company could not free itself from or alter these obligations by entering into a conciliation agreement to which the bargaining agent was not a party. An employer, the Court held, could not escape responsibility under one contract by entering into another that contained conflicting terms.[175]

& Co. had discriminated against women and blacks in violation of title VII. *Id.* at 759. The Director also had found that the company's seniority systems unlawfully perpetuated the effects of past discrimination. *Id.*

168. W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757 (1983). The Supreme Court decided this cases under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1982). The conflict the Court faced was similar to the conflict it faced in *Stotts* the following year. *See* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2581-82 (1984) (addressing conflict between consent decree that conflicted with seniority provisions of collective bargaining agreement).

169. 461 U.S. 757 (1983).

170. *Id.* at 759. An arbitrator made the award in question, having before him the company's undisputed admission that it had violated the security provisions of its collective bargaining agreement. *Id.* at 763. The arbitrator also accepted the company's position that they acted in good faith in following the conciliation agreement. *Id.* He concluded, however, that the contract did not contain a good faith exception and that the company breached the collective bargaining agreement at its own risk. *Id.* at 763-64. Thus, the conciliation agreement did not "extinguish the Company's liability for its breach." *Id.* at 764. In an action by the company to overturn the arbitrator's award, the district court found that "public policy prevented enforcement of the collective bargaining agreement." *Id.* The court of appeals reversed, applying a standard of review that deferred to the arbitrator's decision unless it detracted from the terms of the collective bargaining agreement. *Id.* at 764. The Supreme Court affirmed this decision. *Id.* at 772.

171. *Id.* at 767.

172. *Id.* The Court recognized that the company needed to reduce its work force, however, the Court refused to allow economic necessity as a defense to the company's breach of the bargaining agreement. The Court stated that the company could not avoid liability under voluntarily assumed contractual obligations merely because it would have suffered economic loss by postponing or forgoing its layoff plans. *Id.* at 768 n.12.

173. *Id.* at 770.

174. *Id.*

175. *Id.* at 771. The Court stated that permitting the company to alter the collective bargaining agreement without the union's consent would undermine the federal labor policy in favor of enforcing collective bargaining agreements. *Id.* This policy, however, comes into

The Supreme Court in *Firefighters Local Union No. 1784 v. Stotts*,[176] continued its very limited reading of title VII. The decision effectively negated black firemen's rights to employment acquired under a consent decree that conflicted with seniority provisions under a collective bargaining agreement.[177] In *Stotts* the Court circumscribed the reach of title VII. In contrast with its decision in *Grace*, the Court denied relief under the consent decree and treated seniority rights with great deference in derogation of minorities' employment rights.[178]

III. THE DECISION IN *FIREFIGHTERS LOCAL UNION No. 1784 v. STOTTS*

With the Supreme Court's decision in *Stotts*, the conflict between seniority and title VII reached a climax. Justice Blackmun, in his dissent, noted that the majority's opinion in *Stotts* "is troubling less for the law it created than for the law it ignored."[179] The following section of this Article will analyze the decision in *Stotts*. First, it will set forth the facts of the case. Then, it will analyze the lower court opinions followed by the Supreme Court's majority and dissenting opinions. Finally, it will critically evaluate the decision in *Stotts*.

A. The Facts of Stotts

In 1974, the United States Department of Justice instituted an action against the city of Memphis alleging that the Memphis Fire Department and other city divisions engaged in a pattern or practice of discrimination based on race and sex in the city's hiring and promotion policies.[180] To settle the dispute, the parties entered into a consent decree.[181] Pursuant to that decree, the city of Memphis agreed to increase black and female representation in the city's workforce to approximate the percentage in the Memphis workforce.[182] The city, however, made slow progress towards meet-

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conflict with the policy in favor of voluntary compliance with the antidiscrimination laws where collective bargaining agreements conflict with such voluntary measures.

176. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984).

177. *Id.* at 2590.

178. *Id.*

179. *Id.* at 2595 (Blackmun, J., dissenting).

180. Stotts v. Memphis Fire Dep't, 679 F.2d 541, 546-47 (6th Cir. 1982), *rev'd sub nom.* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984).

181. Consent Decree, United States v. City of Memphis, No. C-74-286, *reprinted in* Stotts v. Memphis Fire Dep't, 679 F.2d 541, 570-73 app. (6th Cir. 1982), *rev'd sub nom.* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984) hereinafter cited as 1974 Consent Decree.

182. Stotts v. Memphis Fire Dep't, 679 F.2d 541, 547 (6th Cir. 1982), *rev'd sub nom.* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984). The 1974 decree's purpose was twofold. First, it sought to ensure that in the future the city would not place blacks

ing its goal. Seven years after entry of the decree, less than twelve percent of uniformed fire department employees as compared to thirty-five percent of the Memphis workforce were black. The great majority of blacks the city had hired by 1981 remained in entry level positions. White workers occupied almost exclusively the higher-level positions.[183]

In 1977, Carl Stotts, a black captain in the city's fire department, filed a class action suit against the city of Memphis in federal district court, alleging that the fire department had denied him a promotion based on his race.[184] After extensive discovery, the parties entered into another consent decree. The decree incorporated the long-term hiring goals that the earlier decree set forth and enumerated specific hiring and promotion quotas.[185]. The decree also gave the district court jurisdiction to issue further orders to effectuate the purposes of the decree.[186]

On May 4, 1981, the city announced that budget deficits would require the layoff of nonessential personnel from all departments.[187] The layoffs were to be conducted on a last-hired, first-fired basis.[188] Although neither decree directly addressed the question of layoffs, the 1974 decree provided that for "promotion, transfer and assignment," the seniority of a member of the protected class was that person's total seniority with the city.[189] The city demoted fourteen of eighteen blacks promoted under the 1980 decree and laid off fifteen of eighteen blacks hired under that decree.[190]

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and women at a disadvantage in its hiring, promotion, and transfer policies. Second, it sought to remedy the disadvantage that blacks and women suffered from past discrimination so that they could enjoy equal employment opportunities. *Id.* at 571.

183. Brief for Respondents on Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit at 3-4, Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982), *rev'd sub nom.* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984).

184. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2581 (1984). In 1979, another black firefighter filed an action alleging that the city had denied him a promotion because of his race. *Id.* The district court consolidated the cases. *Id.*

185. Consent Decree, Stotts v. Memphis Fire Dep't, No. C-79-2441-M, *reprinted in* Stotts v. Memphis Fire Dep't, 679 F.2d 541, 573-79 app. (6th Cir. 1982), *rev'd sub nom.* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984) hereinafter cited as 1980 Consent Decree. The decree required that the city annually fill at least 50% of all vacancies with qualified black applicants, insure that at least 20% of firefighters promoted into each position would be black, and promote certain named plaintiffs. *Id.*

186. *Id.* at 578.

187. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2581 (1984).

188. *Id.*

189. 1974 Consent Decree, *supra* note 181, at 572 app. Because the stated purpose of the 1980 decree was not only to remedy the city's past hiring practices, but also to continue the hiring and promotion efforts made under the 1974 consent decree, it is possible to argue that the 1980 decree incorporated by reference the seniority provision of the 1974 decree. This argument is buttressed by the fact that the 1980 decree incorporated the 1974 decree's long term hiring goals. 1980 Consent Decree, *supra* note 185, at 576 app.

190. Brief for Respondents on Writ of Certiorari to the United States Court of Appeals

B. The Lower Courts' Decisions

1. The district court

The plaintiffs in *Stotts* applied for a temporary restraining order in the United States District Court for the Western District of Tennessee to enjoin the city from disproportionately laying off and demoting black fire department personnel protected by the decree.[191] The district court entered the requested order; plaintiffs then moved for a preliminary injunction against the layoffs and demotions. After a hearing, the district court entered an order enjoining the city from "applying the seniority policy proposed insofar as it will decrease the percentage of blacks in certain enumerated positions."[192] Both parties appealed the district court's order.[193]

2. The court of appeals

The United States Court of Appeals for the Sixth Circuit affirmed the district court's decision.[194] The Sixth Circuit's review was limited to determining whether the district court erred in modifying the 1980 decree to prevent minority employees from being affected disproportionately by unanticipated layoffs.[195] The court of appeals concluded that the modified decree was fair and reasonable, the result of good faith, arm's-length negotiations.[196] The court, moreover, deemed the affirmative action provisions to be reasonably related to the remedial purpose of correcting the racial imbalance in

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for the Sixth Circuit at 8-9, Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982), *rev'd sub nom.* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984).

191. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2582 (1984).

192. Stotts v. Memphis Fire Dep't, 679 F.2d 541, 551 (6th Cir. 1982), *rev'd sub nom.* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984). One month later, the district court expanded its order to include three additional positions. *Id.* The court gave three reasons for its order. First, the layoffs and demotions constituted a change in circumstances. Second, the purpose of the 1980 decree was to correct the city's past hiring and promotion practices. Third, "the proposed layoffs, would have a devastating and retrogressive effect on minority employment and the affirmative action accomplished pursuant to the consent decrees." *Id.* at 549. Thus, the court "ruled that the layoff policy would have a discriminatory impact and the seniority system was not bona fide." *Id.* at 550-51.

193. Stotts v. Memphis Fire Dep't, 679 F.2d 541, 551 (6th Cir. 1982), *rev'd sub nom.* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984).

194. *Id.* at 541. The court of appeals noted, however, that the district court had erred in concluding that the city's seniority system was not bona fide. *Id.* at 551 n.6. The court of appeals followed the standard that the Supreme Court articulated in International Bhd. of Teamster v. United States, 431 U.S. 324 (1977), which required a finding of discriminatory intent. *See supra* notes 100-10 and accompanying text (discussing standard in *Teamsters*).

195. Stotts v. Memphis Fire Dep't, 679 F.2d 541, 551 (6th Cir. 1982), *rev'd sub nom.* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984).

196. *Id.* The court considered the plaintiffs' statistical evidence of the city's discrimination patterns and concluded it was sufficient to create a strong prima facie case. *Id.* at 555-56. The court also noted that the decree adequately recognized the interests of nonminorities because it required that the city fill only 20% of its promotions with minorities. *Id.* This is the standard accepted in *Weber*. *See supra* notes 124, 132 (discussing Weber).

the city's workforce,[197] noting that consent decrees are favored means of resolution of title VII suits.[198] The court also found that the goal of achieving racial diversity was a reasonable and constitutionally legitimate interest for the city to pursue.[199]

Next, the court determined that the district court acted properly in modifying the decree.[200] The court noted that a trial court retains continuing jurisdiction to modify a decree if its operation becomes unreasonable,[201] when the actions of one party threaten to frustrate the decree's purpose. Thus the trial court has a duty to ensure that the parties carry out the terms of the decree.[202] The court concluded that if the city conducted the proposed layoffs according to its existing seniority system, it would breach its duty under the consent decree to engage in affirmative action in hiring and promotion decisions.[203] The court refused to allow an economic hardship defense to the city's contract breach,[204] but found that the modification allowed the city to proceed with its proposed layoffs without unreasonably violating its obligation under the decree.[205]

The court cited three theories in support of the proposition that a consent decree can alter the seniority provisions of a collective bargaining agreement over the objections of an adversely affected union. First, it recognized title VII's strong policy favoring voluntary settlement.[206] Second, the court acknowledged that the consent decree did not decrease the power of the court to order relief under title VII.[207] The court also argued that an employer could override, temporarily, the provisions of a collective bargaining agreement pursuant to a valid affirmative action plan.[208]

C. The Supreme Court

1. The majority opinion

In its review of the district court's preliminary injunction, the Supreme Court majority[209] framed the issue as being whether the

197. *Id.* at 553.
198. *Id.* at 555.
199. *Id.* at 552-53.
200. *Id.* at 564.
201. *Id.* at 556.
202. *Id.* at 557.
203. *Id.* at 561.
204. *Id.* at 561-62.
205. *Id.*
206. *Id.* at 565.
207. *Id.* at 566.
208. *Id.* at 566-67.
209. Justice White delivered the opinion for the majority. Firefighters Local Union No.

court exceeded its powers in ordering the city to lay off white employees when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority.[210] The Court concluded that the appellate court had erred in affirming the district court's order.[211] The Court, moreover, found that the district court's injunction did not enforce the express terms of the consent decree.[212] Stating that consent decrees must be read within their four corners and that the decrees in question did not expressly mention layoffs, the Court ruled that the district court's order fell outside the scope of the parties' agreement.[213] The Court also decided that the layoffs caused by the unexpected economic crisis did not constitute a change of circumstances that would justify a modification of the consent decree, even where the layoffs threatened to frustrate the decree's purpose.[214]

1784 v. Stotts, 104 S. Ct. 2576, 2581-90 (1984). Justice O'Connor filed a concurring opinion, *id.* at 2590-94 (O'Connor, J., concurring), as did Justice Stevens. *Id.* at 2594-95 (Stevens, J., concurring). Justice O'Connor agreed with the majority's conclusion that § 703(h) protected the seniority system because the trial court found no discriminatory animus. *Id.* at 2592 (O'Connor, J., concurring). In addition, she argued that a court cannot grant preferential treatment to any group. A court may use its remedial powers under title VII, she asserted, only to prevent future violations and to compensate actual victims of discrimination. *Id.* at 2593. The respondents chose not to allege specific instances of discrimination, therefore, Justice O'Connor concluded, the Court correctly held under the standard of review for preliminary injunctions that respondents could not have prevailed if the case had gone to trial. *Id.*

In his concurrence, Justice Stevens argued that the case involved only the administration of a consent decree, and did not involve any issue under title VII. *Id.* at 2594 (Stevens, J., concurring). Justice Stevens believed there were two ways in which it was possible to justify the injunction. First, the injunction could be justified as a reasoned construction of the consent decree. *Id.* at 2595. The district court, however, never stated that it was construing the decree, nor did it rely on any particular portion of the decree. *Id.*

The other possible theory to justify the injunction was as a modification of the decree, which would be appropriate if the circumstances had changed. *Id.* Justice Stevens identified the adverse impact that the proposed layoffs would have on blacks as the only changed circumstance. *Id.* He, however, did not consider this impact a change of circumstance that would justify a modification of the decree. *Id.*

210. *Id.* at 2576.

211. *Id.*

212. *Id.*

213. *Id.* at 2585-86. The Court argued that the terms of the 1980 decree suggested that the parties did not intend to depart from the existing seniority system because the decree contained no express provision to that effect. *Id.* at 2586. In fact, the decree stated that it was not "intended to conflict with any provisions' of the 1974 decree," which expressly anticipated that the city would recognize seniority. *Id.* at 2586. The only mention of seniority in the 1974 decree, however, was in relation to promotion, transfer, and assignment, and not in the context of layoffs. 1974 Consent Decree, *supra* note 181, at 572 app.

214. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2586-87 (1984). The court of appeals had held that the modification was appropriate because the layoffs were a new and unforeseen change in circumstances which threatened to frustrate the purpose of the decree. Stotts v. Memphis Fire Dep't, 679 F.2d 541, 563 (6th Cir. 1982), *rev'd sub nom.* Firefighters Local No. 1784 v. Stotts, 104 S. Ct. 2576 (1984). These unanticipated economic circumstances necessitated action that would prevent the imposition of an undue burden on blacks, even if the solution conflicted with a bona fide seniority system. *Id.*

In addition, the Court held that the provision in the consent decree permitting the district court to enter any order it deemed necessary to effectuate the purpose of the decree did not apply to the court's order in this case.[215] The effect of the injunction, the Court held, was to displace white employees with seniority over blacks.[216] The Court viewed this remedy as improper under title VII's protection of bona fide seniority systems.[217] Emphasizing section 703(h)'s protection of bona fide seniority systems and relying on its decisions in *Teamsters* and *Franks*, the Court reiterated that a system is bona fide unless implemented with an *intention* to discriminate.[218] The Court found that there was no showing of discriminatory intent and, therefore, that the seniority system was bona fide and the layoffs pursuant to it were proper.[219]

2. The dissent

The dissenters, in an opinion that Justice Blackmun authored and Justices Marshall and Brennan joined,[220] criticized the majority's failure to recognize that the Court's sole task at hand was to review the issuance of a preliminary injunction.[221] Instead, the majority looked at the district court's order as a permanent injunction, a remedy never awarded in the lower court.[222] Moreover, the dissenters

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215. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2586 (1984). The decree's purpose, the Court found, was to "remedy past hiring and promotion practices" of the Fire Department. *Id.* The decree went on to provide a remedy, the Court found, that did not include the displacement of white employees with seniority over blacks. *Id.*

216. *Id.*

217. *Id.* The Court also recognized that the union was not a party to the consent decree and that members' rights should not be encroached without their consent. *Id.* However, this totally ignored the Court's unanimous decision during the previous term in W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 759 (1983). *See supra* notes 167-75 and accompanying text (discussing *W.R. Grace*).

218. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2587 (1984).

219. *Id.* at 2587-88. In reaching its conclusion, the Supreme Court rejected the theories advanced by the court of appeals. First the Court rejected the "settlement theory," which proposed that "the strong policy favoring voluntary settlement of title VII actions permitted consent decrees that encroached on seniority systems." *Id.* Second, the Court disagreed with the court of appeals' finding that the trial court had the power to order relief consistent with the remedial purposes of title VII and that, therefore, the trial court had the authority to override seniority provisions to effectuate the purpose of the 1980 Decree. *Id.* at 2588. The Court argued that such relief is available only to actual victims of discrimination. *Id.* at 2588 (citing Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976)).

220. *Id.* at 2596-2610 (Blackmun, J., dissenting). Justice Blackmun commenced his dissent with a strong argument that the case before the court was moot. *Id.* at 2596. Because the layoffs that led to the issuance of the injunction had ended, the injunction had no effect on any action by the city. Thus, the Court could have vacated the judgment of the appellate court in order to terminate the effects of the injunction, as was the Court's longstanding practice. *Id.* at 2596.

221. *Id.* at 2600.

222. *Id.* The dissent noted that the majority's actions went against unanimously decided

argued, even if the district court had issued a permanent injunction, the court of appeals presented adequate grounds for its issuance.[223]

The dissent also argued that the majority misstated the issue before the Court.[224] The lower court did not require the employer to lay off whites. If, however, the employer chose to lay off whites, Justice Blackmun argued, it created a dilemma of its own making by committing itself to two conflicting contractual obligations.[225]

The dissent, in addition, rejected the Court's conclusion that the preliminary injunction was improper because it imposed on the parties, as an adjunct of settlement, relief that the plaintiffs could not have obtained at trial had they proven that a pattern or practice of discrimination existed.[226] Disagreeing with this proposition, the dissent emphasized that courts possess the power to order race-conscious affirmative relief under section 706(g) of title VII.[227] In support of this position, the dissent noted that courts of appeals unanimously agree that such relief is appropriate,[228] because the purpose of title VII is not only to make whole any particular individual, but also to remedy the present class-wide effects of past discrimination or to prevent similar discrimination in the future.[229]

Justice Blackmun charged that the majority's reliance on the decisions in *Teamsters* and *Franks* to require proof of actual discrimination was misplaced.[230] First, the preliminary injunction did not

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precedent. *See id.* at 2600-02 (discussing University of Texas v. Camenish, 451 U.S. 390 (1981)).

223. *Id.* at 2603-10. For a discussion of the court of appeals' rationale, see *supra* notes 194-208 and accompanying text.

224. *See supra* note 210 and accompanying text for the majority's framing of the issue.

225. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2602 (1984) (Blackmun, J., dissenting) (quoting W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 767 (1983)).

226. *Id.* at 2605.

227. *Id.* at 2606. Section 706(g) of title VII provides, in part, as follows:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g) (1982).

The majority argued that the legislative history of the Act indicated that this section did not authorize race-conscious remedies. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2589-90 (1984). The dissent rebutted the majority's interpretation of the legislative history of the section and argued that indeed the section allowed class wide affirmative relief. *Id.* at 2608-10 (Blackmun, J., dissenting).

228. *Id.* at 2606 (1984).

229. *Id.*

230. *Id.* at 2607 (Blackmun, J., dissenting).

award individuals competitive seniority.[231] Second, had the cases gone to trial, the court could have awarded competitive seniority to the plaintiffs had they proven that they were actual victims of discriminatory practices in accordance with the procedures established in *Teamsters* and *Franks*.[232] At a more general level, the Court majority's reliance on *Teamsters* was in error because that case addressed only individual relief, not class-wide, race-conscious relief as in *Stotts*.[233]

D. The Continuing Controversy in Stotts

The following critique of the Supreme Court's decision in *Stotts* is in two parts. The first part analyzes the legal problems with the decision, both procedural and substantive;[234] the second part discusses the practical problems.

1. Legal problems

The majority in *Stotts* committed a major procedural blunder when it decided the validity of a preliminary injunction as if it were a permanent injunction.[235] This procedural error caused the Court to decide the case on the merits without having before it an adequately

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231. *Id.* at 2606.

232. *Id.* at 2607. Justice Blackmun pointed out that, under the procedure established in Teamsters v. United States, 431 U.S. 324, 371, 375 (1977) and Franks v. Bowman Transp. Co., 424 U.S. 747, 762-70 (1976), the plaintiffs first would have established at trial whether the city had engaged in unlawful discrimination. In the second stage, the plaintiffs would have established whether they were victims of discrimination. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2607 (1984).

233. *Id.* at 2608.

234. The initial legal problem with the Court's decision in *Stotts* was the majority's ruling that the case was not moot. *Id.* at 2583. The ruling deviated from the Court's previously established standards for judging mootness. *See supra* note 220 (discussing dissent's criticism of majority's ruling on mootness). The case presented no live case or controversy because the facts underlying the consent decree no longer existed. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2596 (1984) (Blackmun, J., dissenting). Once the court of appeals forbade layoffs that would disproportionately affect blacks, the city chose to conduct the layoffs pursuant to a modified plan under which the city laid off more senior whites before less senior blacks. *Id.* The layoffs, however, ended and the city recalled all the laid off employees. *Id.* Any injury that outlived the recall, including the loss of seniority and pay, could not be resolved either pursuant to the injunction or pursuant to the decree which was the basis for issuance of the injunction. If any controversy existed, it was independent of and separate from the one before the Court. The dissent characterized the injunction as no longer affecting the city so that a "ruling in this situation thus became wholly advisory." *Id.*

The Court's ruling on mootness in *Stotts* constituted serious juggling of established legal standards. The only purpose served by these acrobatics was to grant the Court an opportunity to narrow relief available under the Act, which the Court achieved by limiting the usefulness of consent decrees. Although such overreaching follows the Court's trend to limit title VII relief, it is not to be condoned.

235. Fire Fighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2600 (1984) (Blackmun, J., dissenting) (discussing Court's failure to address validity of preliminary injunction under appropriate "abuse of discretion" standard).

developed record.[236] The problem was exacerbated by the fact that the district court issued the preliminary injunction pursuant to a consent decree. By necessity and definition, the record in a case that the parties resolved by consent lacked any findings or admissions with respect to any legal violations, and was not as developed as the record of a case litigated on the merits.[237]

The Court's reliance on an incomplete, embryonic record penalized the plaintiffs for not having litigated the case on the merits. The proof that the Court required as a prerequisite for affirmative relief—actual victim status or intent to discriminate[238]—could have been adduced if the case had gone to trial. Instead, the Court opted to examine the merits as if it had before it all available evidence.[239] In so doing, the Court neglected its true task: the review of a preliminary injunction.[240] As a result, the Court applied an erroneous legal standard to the detriment of the original plaintiffs, who were scrutinized in a context for which they had not prepared.

The first substantive weakness in the Court's decision is that the decision does not fit the facts of the case. The Supreme Court framed the question before it as whether the district court had improperly entered an injunction that required white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority.[241] There are two major problems with this articulation of the issue: it not only misstates the question before the Court, but it also misinterprets the facts of the case.

The real question before the Court was the propriety of the district court's issuance of a preliminary injunction.[242] The injunction that the district court entered enjoined the defendants from applying the proposed seniority policy insofar as it would decrease the percentage of blacks in certain specified positions.[243] The injunction merely prohibited the employer from altering a previous *hiring* decision made pursuant to the consent decree with respect to a sub-

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236. *See id.* at 2600 (concluding that Court addressed whether proposed layoffs violated consent decree even though issue was not resolved in lower court).

237. *See id.* at 2596-97 (discussing perils of advisory opinions and concluding that issue in instant case was moot).

238. *See id.* at 2587-88 (discussing requirements set forth in *Teamsters* protecting seniority system absent proof of intention to discriminate and limiting redress to actual victims of illegal discrimination).

239. *See id.* at 2600-01 (Blackmun, J., dissenting) (discussing impropriety of Court's treatment of merits of underlying legal claim instead of preliminary injunction).

240. *Id.*

241. *Id.* at 2585.

242. *Id.* at 2591 (O'Connor, J., concurring).

243. *Id.* at 2583.

ject matter within the decree's purview.[244] On its face, the injunction did not require the employer to take any employment action with respect to any nonminority employees.[245] Finally, and most importantly, the injunction on its face did not require the employer to override seniority of existing employees.[246] If, pursuant to the injunction, the employer chose to lay off whites with more seniority than blacks who were retained, layoffs of the nonminorities resulted from the employer's actions, not the district court's mandate.[247]

In addition, not only did the injunction not "require" that the employer lay off white employees, the black employees whom the employer would have laid off in lieu of the white employees did not possess less seniority. The facts before the Court concerned the dismissal of three out of six employees, all of whom possessed equal seniority. The record before the Court indicated that the employer had hired the six employees, three white and three black, on precisely the same day.[248] The city's practice, when equally senior employees with indistinguishable records were involved in layoffs was to apply a reverse alphabetical order system for laying off personnel.[249] Thus, the true differentiating factor among the six employees was the letter of the alphabet with which their last names commenced. In *Stotts*, the blacks' names were more junior—alphabetically speaking—than the whites'.[250] Only by virtue of this scheme did the employer decide that the blacks, instead of the whites, should be dismissed. This indeed was a far cry from the *Stotts* majority's characterization of the facts.

The next major substantive flaw in the majority's opinion was its perception of a conflict between the injunction that the district court issued pursuant to the consent decree and the seniority system set up in the memorandum of understanding between the employer

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244. *See id.* at 2602 (Blackmun, J., dissenting) (arguing that majority was wrong in stating that injunction required employer to lay off white workers).

245. *Id.*.

246. *Id.* at 2606.

247. Id. at 2602. In response to the injunction the employer followed its seniority policy in instituting the layoffs. That policy, however, was the employer's choice, not the result of a court order. The court did not give the employer affirmative instructions on conducting layoffs; it merely informed the employer that it could not conduct layoffs in a fashion that would decrease the percentage of blacks presently employed. *Id.*

248. Brief for Respondents on Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit at 81-83, Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982), *rev'd sub nom.* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984).

249. *Id.*

250. *Id.* at 82-83. Under the layoff policy, the city would have laid off the black workers because their names began with the letters "J" and "M" and because their work records were only as good as, but not better than, records of the white firemen, whose names began with the letters "D" and "H" under this "simultaneously hired, reverse alphabetically fired" system. *Id.*

and the union.[251] Arguably, there were no conflicting enforceable legal documents that created the rights alleged because the memorandum of understanding, which established the seniority system, was not legally enforceable pursuant to state law.[252] In any event, any rights that would arise under the memorandum would be totally separate, as a matter of legal existence, from the employees' rights under the consent decree.

It is arguable that an enforceable seniority system might be found in the employer's unilateral adoption of the seniority policy described in the memorandum. However, in such a case, the existence of enforceable rights would not be based on a document but rather on the employer's adoption of the policy. These rights would be individual contract rights arising between each employee and the employer.[253] Such rights, therefore, are totally separate, as a matter of legal existence, from the employee's rights under the consent decree. Each employee's recourse would be to file a breach of contract claim against the employer.

Regardless of the source of the employees' seniority rights, therefore, they were existent and enforceable on a separate and independent basis from any rights that the consent decree created. If indeed the employer found itself in the midst of conflicting contractual obligations, the conflict was the employer's own responsibility.[254] As the Court stated in its decision in *Grace*, the city could follow the consent decree as the district court ordered and risk liability under the memorandum of understanding, or it could follow the memorandum of understanding and risk both a contempt citation and liability for violation of the consent decree. The city's dilemma, however, was of its own making because the city had committed itself to two conflicting contractual obligations.[255]

Under this contracts analysis, the Court's decision in *Stotts* is flawed. Absent enforceable seniority rights, there could be no conflict between the consent decree and a nonexistent seniority policy. In the event that enforceable seniority rights existed, the Court's reasoning in *Stotts* fails under a *Grace* analysis because obligations

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251. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2587 (1984).

252. *Id.* at 2599 n.4 (Blackmun, J., dissenting) (citing Fulenwider v. Firefighters Ass'n Local Union 1784, 649 S.W.2d 268 (1982)) (holding that memorandum of understanding conferred no enforceable rights). The majority chose to treat the memorandum as enforceable because the court of appeals had assumed that it was valid. *Id.* at 2585 n.7.

253. Of course, in this situation, the right to enforce would belong to each individual, not the Union. The employees might also have a reliance theory on which to base their claim.

254. *Id.* at 2602 (Blackmun, J., dissenting) (quoting W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757 (1983)).

255. W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 767 (1983).

under a consent decree and obligations pursuant to a seniority policy are independent legal obligations.[256] The performance of one obligation does not excuse performance of the other. The employer remains obligated under both agreements and, contrary to the Court's decision in *Stotts*, should not be excused from performance under either.[257]

The third substantive problem with *Stotts* is the Court's misapplication of existing law. The majority relied on both case law and statutory law to reach its decision.[258] In both instances, the Court erroneously applied the pertinent law. The Court's reliance on *Teamsters* was misplaced. The decision in *Teamsters* dealt with individual rights,[259] whereas the Court in *Stotts* adjudicated the rights of a class.[260] In addition, the Court's reliance on the standards set out in *Teamsters* was unfounded because the lower court in *Stotts* did not award retroactive seniority.[261]

The Court's attempt to justify its application of *Teamsters* as consistent with section 706(g) is equally poor. The Court asserted that section 706(g) limits relief available under title VII.[262] This simply is not correct. Indeed, if anything, section 706(g) broadens available relief because it expressly authorizes courts to order any other equitable relief that the court deems appropriate.[263] The only limitation that section 706(g) places on the courts is that they may not grant relief under the section if the employment action was for any reason other than discrimination.[264] It is unfair and illogical to read the section as permitting courts to grant equitable relief exclusively in litigated situations and only to actual victims.[265] Such a reading would eviscerate courts' broad remedial powers in anything but a full-fledged trial. Moreover, such interpretation mocks the policies of title VII specifically, and the judiciary in general, which favor vol-

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256. *See id.* (describing conflict between conciliation agreement and collective bargaining agreement resulting from company's voluntary legal commitments).

257. *See id.* (discussing employer's ability to follow conciliation agreement mandated by district court and thereby risk liability under collective bargaining agreement).

258. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2587-89 (1983).

259. Teamsters v. United States, 431 U.S. 324, 357 (1976).

260. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2608 (1983).

261. *Id.* The issue present in the instant case, the scope of classwide relief, was not present in *Teamsters* because *Teamsters* concerned only the problems of determining victims and the nature of appropriate individual relief. *Id.*

262. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2588-89 (1984).

263. 42 U.S.C. § 2000e-5(g) (1982). *See supra* note 227 for text of § 706(g).

264. *Id.*

265. *See* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2608 (1984) (Blackmun, J., dissenting) (arguing against majority's reading of § 706(g) as prohibiting race-conscious relief).

untary settlement of cases.[266]

At the time when the Supreme Court decided *Stotts*, the courts of appeals unanimously viewed race-conscious affirmative relief as an appropriate remedy in class actions under section 706(g).[267] Furthermore, lower courts have continued this trend after *Stotts*, awarding class-wide, race-conscious, affirmative action relief pursuant to title VII.[268] Such relief is essential to effective enforcement of title VII rights.[269] The protected classes are groups that historically have been victims of discrimination. It is not always the individual that is the target of illicit practices, but rather it is the group to which he or she belongs that subjects the individual to employment discrimination.[270] As the dissent in *Stotts* emphasized, the purpose of class-wide, race-conscious relief is not to make whole any particular individual, but rather to remedy the present, class-wide effects of past discrimination or to prevent similar discrimination in the future.[271]

2. Practical problems

The practical lesson that the Supreme Court's decision in *Stotts* teaches to potential title VII plaintiffs is that voluntary settlement is no longer a dependable resolution of a title VII claim. The chief purpose of consent decrees in discrimination cases is to avoid the time and expense of litigating the issue of liability and identifying the victims of discrimination.[272] Settlement without a resolution on the merits, however, may lock in a record that does not demonstrate discriminatory intent or identify actual victims.[273] In his dissent, Justice Blackmun observed that the majority in *Stotts* focused on what the minority employees actually established in the existing record rather than what they might have established at trial.[274] Presumably, therefore, the majority decision in *Stotts* would support a

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266. *Id.* at 2607-08 (quoting Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981)).

267. *See id.* at 2606 n.10 (citing cases in which courts of appeals held race-conscious relief appropriate).

268. *See infra* note 281 and accompanying text (citing decisions by lower courts that have not strictly adhered to *Stotts* precedent).

269. *See* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2806 (1983) (Blackmun, J., dissenting) (discussing purposes of class-wide, race-conscious relief).

270. *See* Cooper & Sobol, *supra* note 6, at 1602-04 (describing impact of seniority on blacks in previously racially segregated units).

271. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2606 (1984) (Blackmun, J., dissenting).

272. *Id.* at 2607.

273. *See id.* at 2588 (discussing failure to show that any blacks protected from layoffs were actual victims of discrimination or were awarded competitive seniority). In his dissent, Justice Blackmun characterized the court's focus as unfair because it criticized respondent for failing to show claims that never went to trial. *Id.* at 2607 (Blackmun, J., dissenting).

274. *Id.*

court's decision on the merits in a dispute concerning a title VII consent decree based on a settlement oriented record. Based on the decision in *Stotts*, litigants would be well-advised to avoid settlement to assure the fullest possible record for review. Litigation would become practically unavoidable as the uncertainty of later court treatment of the record would outweigh the advantages of voluntary settlement.[275]

For potential title VII defendants, the opinion in *Stotts* also discourages settlement. The advantage that defendants derive from settlement is that the public does not scrutinize the defendant's past discriminatory practices in the context of the courtroom. In addition, defendants may be able to arrange a settlement more to their liking than a court imposed affirmative action plan. It is a great disincentive to settlement if, as a precondition, a defendant must concede liability.[276] The burden that the majority in *Stotts* imposes hurts both sides.

Parties rely on the judicial system to provide equitable resolution of disputes, especially when each side feels justified in its position. Justice Brennan has recognized that "a case settled is a case best disposed of, because then one of the parties certainly avoids the heartache of losing at the trial"[277] Loss of the prospect of dependable voluntary settlement deprives the parties of an important opportunity to use the system to their mutual advantage.

The majority's decision in *Stotts* will impose costs on plaintiffs, defendants, and the public. Plaintiffs will need vast resources to pursue title VII relief. If plaintiffs can afford to file, defendants can expect both legal expenses and loss of goodwill. Discovery will be complicated and expensive. Society will pay the cost of litigation that could have reached settlement. More importantly, society also will pay the cost of continuing discrimination. When plaintiffs cannot afford to litigate and when defendants are afraid to initiate settlement, the elimination of illegal discrimination is frustrated.

It may be impossible to ascertain the extent to which the decision in *Stotts* actually increases the cost of title VII litigation. The prospect of added expense, however, is a step backward in the elimination of employment discrimination.[278] Consent decrees retain the

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275. *See id.* (discussing preference for voluntary settlement of employment discrimination claims).

276. *Id.*

277. Colliers & Levin, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 239 n.70 (1985) (quoting DEPARTMENT OF JUSTICE, PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON COURT CONGESTION AND DELAY IN LITIGATION 87 (1956)) (citations omitted).

278. As Justice Brennan stated, "the cost of litigation is excessive if the same quality of

advantages of speed and economy as compared to protracted litigation. The Supreme Court in *Stotts* discounted the quality of voluntary dispute resolution, leaving full scale litigation the only reliable method for obtaining title VII relief.

IV. THE CONTINUING DILEMMA: TITLE VII v. SENIORITY

Many questions remain open after the Supreme Court's decision in *Stotts* with respect to the interplay between seniority rights and title VII rights.[279] The following section of this article analyzes the cases decided after *Stotts*, giving special attention to *Wygant v. Jackson Board of Education*.[280] The section then scrutinizes the decision making of individual Supreme Court justices in this area.

A. The Aftermath of the Decision in Stotts

Notwithstanding the Supreme Court's decision in *Stotts*, lower courts have continued to hold that courts may award race-conscious affirmative action relief pursuant to title VII.[281] Recently, in sup-

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dispute resolution could be provided to litigants in a more efficient manner—at less expense and with less delay." *Id.* at 238.

279. Numerous lower federal courts already have cited the decision in *Stotts*. *See, e.g.*, Devereaux v. Geary, 765 F.2d 268, 269 (5th Cir. 1985) (construing *Stotts* as not invalidating consent decree); Turner v. Orr, 759 F.2d 817, 820-21 (11th Cir. 1985) (applying *Stotts* analysis of consent decree); United States v. Western Elec. Co., Inc., 592 F. Supp. 846, 859 n.41 (D.D.C. 1984) (noting *Stotts* Court's clear implication to look at parties' intent in analyzing consent decree). Several lower courts have cited *Stotts* for its procedural holding, even in cases unrelated to title VII. Most of these cases cite *Stotts* for the proposition that courts must ascertain the scope of a consent decree from its four corners. Turner v. Orr, 759 F.2d 817, 821 (11th Cir. 1985); H.F. Allen Orchards v. United States, 749 F.2d 1571, 1574 (Fed. Cir. 1984), *cert. denied*, 106 S. Ct. 64 (1985); National Wildlife Fed'n v. Gorusch, 744 F.2d 963, 971 (3d Cir. 1984) (environmental law); Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1011 (7th Cir. 1984); Uzzell v. Friday, 592 F. Supp. 1502, 1520 (M.D.N.C. 1984); United States v. Western Elec. Co., 592 F. Supp. 846, 858 n.41 (D.D.C. 1984) (antitrust). One case discussed and distinguished the ruling in *Stotts* on mootness. Boston Chapter, NAACP v. Beecher, 749 F.2d 102, 104 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 2154 (1985). Other cases citing *Stotts* have addressed the limits of title VII relief, including distinguishing between court ordered and voluntary relief and in analyzing the Court's "actual victim" language. *See infra* notes 285-86 (citing cases distinguishing *Stotts*).

280. 746 F.2d 1152 (6th Cir.), *cert. granted*, 105 S. Ct. 2015 (1985), *rev'd*, 54 U.S.L.W. 4479 (1986).

281. *See* EEOC v. Local 638, Sheet Metal Workers Int'l Ass'n, 753 F.2d 1172, 1185 (2d Cir. 1985) (rejecting contention that Court in *Stotts* eliminated all race-conscious relief except that benefiting specifically identified victims of past discrimination), *cert. granted*, 106 S. Ct. 58 (1985); Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479, 487-88 (6th Cir.) (reading *Stotts* in light of *Weber* and concluding that *Weber* precludes any notion title VII forbids voluntary affirmative action by employer), *cert. granted sub nom.* Local 98, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 106 S. Ct. 59 (1985). On February 25, 1986, the Supreme Court heard back to back arguments on *Local 638* and on *Vanguards*. In deciding *Local 638*, the Supreme Court will answer whether title VII prohibits court ordered affirmative action plans that establish numerical goals for minority membership in a union. The respondent urged the Court that § 706(g) permits a court to order race-conscious relief to persons who are not actual victims of discrimination. *See* 54 U.S.L.W. 3574 (U.S. Mar. 4, 1984) (providing summary of argument). In *Vanguards*, on the other hand, the petitioner-union urged

port of race conscious relief, the United States Court of Appeals for the Ninth Circuit declared that "Title VII was designed to deter and remedy discrimination on the basis of group characteristics and to remove barriers that favor certain groups over others."[282] In general, courts have concluded that section 706(g) does not limit the remedies available to parties through consent decrees.[283] They have narrowly construed any attempts to limit relief available through consent decrees and have emphasized that courts' concerns should focus on whether the agreement furthers the purposes of title VII.[284]

Lower courts' interpretation of title VII as not limiting the scope of voluntary relief has narrowed the impact of *Stotts*. These courts have concluded that *Stotts* did not address title VII limits on the adoption of voluntary affirmative action plans. This construction restricts *Stotts*' precedential value to cases of court-ordered relief.[285]

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the Court to rule that title VII prohibits courts from approving consent decrees that contain race-conscious affirmative action plans because § 706(g) expressly limits relief to actual victims of discrimination. *See* 54 U.S.L.W. 3574 (U.S. Mar. 4, 1986) (providing summary of argument). These cases, together with *Wygant*, *see infra* notes 294-98 and accompanying text (discussing *Wygant*) will clarify the impact of *Stotts* on title VII affirmative relief. *See also* Diaz v. AT&T, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985) (holding that *Stotts* does not undermine group-rights goals of title VII); Van Aken v. Young, 750 F.2d 43, 45 (6th Cir. 1984) (supporting voluntary race-conscious affirmative relief); Wygant. v. Jackson Bd. of Educ., 746 F.2d 1152, 1158 (6th Cir. 1984) (finding that *Weber* was controlling and stating that it was not overturned by *Stotts*), *cert. granted*, 105 S. Ct. 2015 (1985); Kromnick v. School Dist. of Philadelphia, 739 F.2d 894, 909 (3d Cir. 1984) (noting that courts of appeals have found unanimously that title VII, like equal protection, does not forbid race-conscious remedial action), *cert. denied*, 105 S. Ct. 782 (1985); Hammon v. Barry, 606 F. Supp. 1082, 1094 (D.D.C. 1985) (holding *Stotts* did not preclude use of any race-conscious affirmative action plan); Deveraux v. Geary, 596 F. Supp. 1481, 1486 (D. Mass. 1984) (noting Court in *Stotts* would have made its intention clear if it had meant to require actual discrimination in any affirmative action case), *affirmed*, 765 F.2d 268 (1st Cir. 1985).

282. Diaz v. AT&T, 752 F.2d 1356, 1360 (9th Cir. 1985).

283. *See* Turner v. Orr, 759 F.2d 817, 824 (11th Cir. 1985) (stating court has authority to approve consent decree that provides remedies not provided by statute); Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479, 487 (6th Cir.) (stating § 703(h) and 706(g) failed to address actions employer may take voluntarily), *cert. granted*, 106 S. Ct. 59 (1985); Dougherty v. Barry, 607 F. Supp. 1271, 1286 (D.D.C. 1985) (distinguishing *Stotts* as not dealing with limits imposed under title VII on adoption of voluntary affirmative action).

284. *See* Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1125 (D.C. Cir. 1983) (focusing on statute's purpose, not parties' interests, in assessing agreement), *cert. denied*, 104 S. Ct. 2668 (1984).

285. *See* Turner v. Orr, 759 F.2d 817, 824 (11th Cir. 1985) (distinguishing *Stotts* as involving court-ordered relief); Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479, 489 (6th Cir.) (stating Court in *Stotts* did not treat case as involving voluntary action), *cert. granted*, 106 S. Ct. 59 (1985); Van Aken v. Young, 750 F.2d 43, 45 (6th Cir. 1984) (distinguishing *Stotts* as involving vested seniority rights); Wygant v. Jackson Bd. of Educ., 746 F.2d 1152, 1158 (6th Cir. 1984) (reading *Stotts* as not barring voluntary affirmative action relief), *cert. granted*, 105 S. Ct. 2015 (1985), *rev'd on other grounds*, 54 U.S.L.W. 4479 (1986); Kromnick v. School Dist., 739 F.2d 894, 911 (3d Cir. 1984) (distinguishing *Stotts* and noting that in the instant case school district and union incorporated race-conscious affirmative relief in collective bargaining contract), *cert. denied*, 105 S. Ct. 782 (1985); Dougherty v. Barry, 607 F. Supp. 1271, 1286 (D.D.C. 1985) (noting Court in *Stotts* did not address limits on voluntary programs under title VII,

Courts also have interpreted narrowly the "actual victim" language of the decision in *Stotts*. The Second Circuit expressly refused to interpret *Stotts* as prohibiting all race-conscious relief except to specifically identified victims of past discrimination.[286] One court commented that if the Supreme Court had intended to "rewrite" the Act to limit affirmative action relief to actual victims of discrimination, it would have clearly stated its intention in its decision in *Stotts*.[287]

The *Stotts* majority also held that affirmative court relief was not proper without proof of intent to discriminate.[288] Illustrating the confusion as to the reach of *Stotts*, the Seventh Circuit recently vacated its affirmance of and granted a rehearing on a ruling in which an Indiana district court refused to apply this requirement with respect to a voluntary affirmative action plan.[289] The district court had distinguished *Stotts* by juxtaposing court ordered relief and voluntary affirmative action.[290]

The Court's decision in *Stotts* has not impeded federal courts' reliance on *Weber* to conclude that title VII allows employers voluntarily to agree to plans that provide for seniority overrides.[291] Courts

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only limits on district court's power); Hammon v. Barry, 606 F. Supp. 1082, 1094 (distinguishing *Stotts* on grounds that *Hammon* court was dealing with voluntarily adopted plan).

286. EEOC v. Local 638, Sheet Metal Workers Int'l Ass'n, 753 F.2d 1172, 1185 (2d Cir.), *cert. granted*, 106 S. Ct. 58 (1985); *accord* Paradise v. Prescott, 767 F.2d 1514, 1530 (11th Cir. 1985) (upholding district court's order enforcing consent decrees without showing of actual discrimination); Deveraux v. Geary, 596 F. Supp. 1481, 1486 (D. Mass. 1984) (rejecting interpretation of *Stotts* as changing title VII law so as to make illegal all affirmative action programs unless there exists an actual victim), *aff'd*, 765 F.2d 268 (1st Cir. 1985); *see also* Geier v. Alexander, 593 F. Supp. 1263, 1265 (M.D. Tenn. 1984) (rejecting government's suggestion that court apply actual victim language of *Stotts* to school desegregation cases in order to limit remedial powers of the court to afford affirmative relief only to actual victims and basing remedial order, instead, on finding that members of defined group suffered effect of specific acts of discrimination).

287. Deveraux v. Geary, 596 F. Supp. 1481, 1486 (D. Mass. 1984), *aff'd*, 765 F.2d 268 (1st Cir. 1985).

288. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2587 (1984).

289. Britton v. South Bend Community School Corp., 593 F. Supp. 1223, 1230 (N.D. Ind. 1984) (distinguishing *Stotts* as dealing with court-imposed affirmative action programs), *aff'd*, 775 F.2d 794 (7th Cir. 1985), *reh'g granted and judgment vacated*, 783 F.2d 106 (7th Cir. 1986); *see also* Grann v. City of Madison, 738 F.2d 786, 795 n.5 (7th Cir. 1984) (limiting *Stotts* to cases where no discrimination is proven), *cert. denied*, 105 S. Ct. 296 (1985); NAACP v. Detroit Police Officers Ass'n, 591 F. Supp. 1194, 1202-03 (E.D. Mich. 1984) (rejecting *Stotts* analysis in constitutional litigation where there had been prior judicial determination regarding past intentional discrimination). *Cf.* NAACP v. Detroit Police Officers Ass'n, 591 F. Supp. 1194, 1202-04 (E.D. Mich. 1984) (holding that *Stotts* was not controlling in issues that involve liability under fourteenth amendment).

290. *See* Britton v. South Bend Community School Corp., 593 F. Supp. 1223, 1230-37 (N.D. Ind. 1984) (concluding that application of *Stotts* in court imposed affirmative action programs does not extend to voluntary affirmative action plan), *aff'd*, 775 F.2d 794 (7th Cir. 1985), *reh'g granted and judgment vacated*, 783 F.2d 106 (7th Cir. 1986).

291. Hammon v. Barry, 606 F. Supp. 1082, 1095 (D.D.C. 1985) (reading *Weber* to hold *Stotts* did not forbid voluntary affirmative action to override seniority systems).

have adjudicated even voluntary consent judgments to be consistent with title VII's goal of eradicating "historical racial inequities in employment."[292] Notwithstanding lower courts' rulings after *Stotts*, much speculation remains as to whether the Supreme Court intended to overrule *Weber* sub silentio.[293] The Supreme Court did not answer this question when it decided *Wygant v. Jackson Board of Education*.[294]

In *Wygant*, with no prior judicial determination of discrimination by the employer, the United States Court of Appeals for the Sixth Circuit upheld an affirmative action plan that was incorporated into a collective bargaining agreement.[295] The agreement provided that, in the event of teacher layoffs, those teachers with the least seniority would lose their jobs first, except that the employer would never lay off minority personnel in a percentage greater than the percentage of minority personnel employed at the time of the layoff.[296] The Sixth Circuit ruled that the Court's decision in *Stotts* did not bar this form of affirmative action.[297] The Supreme Court decided that the Constitution bars this affirmative action relief as applied in *Wygant*. It is uncertain what effect, if any, the *Wygant* decision will have on

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292. Turner v. Orr, 759 F.2d 817, 826 (11th Cir. 1985) (citations omitted).

293. Turner v. Orr, 759 F.2d 817, 826 (11th Cir. 1985); Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479, 487-88 (6th Cir.), *cert. granted*, 106 S. Ct. 59 (1985); Wygant v. Jackson Bd. of Educ., 746 F.2d 1152, 1158 (6th Cir. 1984), *cert. granted*, 106 S. Ct. 58 (1985); Hammon v. Barry, 606 F. Supp. 1082, 1095 (D.D.C. 1985). *But see* Vanguards of Cleveland v. City of Cleveland, 753 F.2d at 489-93 (Kennedy, J., dissenting) (arguing that *Stotts* was controlling because based on facts before court, principles of court ordered relief should apply, not principles of voluntary actions).

294. 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985). The Court, however, did not address the title VII claim because petitioners did not appeal its dismissal by the district court. The district court and circuit court opinions did address the title VII questions. Because the Supreme Court limited its review to constitutional issues, *Wygant*'s effect on title VII law remains unclear. Given the parallel development of constitutional and title VII claims, the constitutional analysis could be applicable to a title VII case. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 136-37 (1976) (holding that employer disability benefits' exclusion of pregnancy does not violate title VII or Equal Protection Clause); *see also infra* note 298 (discussing *Wygant*'s possible effect on title VII law). *See infra* note 298 (stating Court's position on affirmative action relief as presented in *Wygant*.

295. Wygant v. Jackson Bd. of Educ., 746 F.2d 1152, 1158 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985), *rev'd*, 54 U.S.L.W. 4479 (1986). The court relied on United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979) (concluding that title VII allows voluntary affirmative action plans); Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 1154-55 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981) (extending *Weber* to public sector). The court in *Wygant* also relied on *Young* for the proposition that a judicial determination of discrimination is unnecessary for a state to take voluntary action. Wygant v. Jackson Bd. of Educ., 746 F.2d 1152, 1158 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985).

296. *Id.* at 1154. Because of improved economic conditions, only one teacher assignment was involved at the time that the United States Court of Appeals for the Sixth Circuit heard argument on the case. *Id.*

297. *Id.* at 1157-58. The court distinguished *Stotts* as involving court-ordered relief in reaching its decision. *Id.* The court also held that *Stotts* did not overrule *Weber*. *Id.*

the relief that courts may provide under title VII.[298]

B. The Supreme Court Trend

Equal employment opportunity policy development was most expansive in the early 1970's. In 1971, the Court significantly extended the reach of title VII when it held that a showing of discriminatory effect on a protected class sufficed to establish a violation of the Act.[299] The Court furthered this liberal trend by allowing back pay[300] and retroactive seniority relief[301] in order to make whole victims of discrimination. The Court addressed the conflict between affirmative relief and the seniority rights of nonminority employees and concluded that relief could not be denied on the basis of possible adverse impact on nonminority employees.[302]

By 1977, the Court shifted away from its early active protection of minority rights toward a zealous protection of nonminorities' rights, focusing on their "vested" seniority rights.[303] By reading section 703(h) without regard to the purposes of the Act, the Court gave virtually blanket protection to collectively bargained seniority sys-

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298. It is unpredictable to what extent the *Wygant* case will affect the state of title VII law. The Supreme Court heard the case on a constitutional question. As phrased by the Department of Justice in its brief in *Wygant*, the constitutional question is "whether the Equal Protection Clause of the Fourteenth Amendment permits a public entity to grant certain public employees preferential protection against layoffs solely on the basis of their race or national origin, when there is neither a finding nor even evidence that these (or any) employees have been discriminated against by that entity." Brief for the United States as Amicus Curiae at 1, Wygant v. Jackson Bd. of Educ., 746 F.2d 1152, 1154 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985). With the possible exception of Justice White, the Justices in *Wygant* agree that affirmative action relief is constitutionally permitted. *Wygant v. Jackson Bd. of Educ.*, 54 U.S.L.W. 4479, 4481 (1986) (White, J., concurring); *id.* at 4482-84 (Powell, J., plurality opinion); *id.* at 4484-87 (O'Connor, J., concurring); *id.* at 4489 (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.); *id.* at 4492-93 (Stevens, J. dissenting). The Justices also agree that actual findings of past discrimination are not a prerequisite for the adoption of such relief. *Id.* at 4482 (Powell, J., plurality opinion); *id.* at 4485 (O'Connor, J., concurring); *id.* at 4490 (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.). A holding in *Wygant* that affirmative action relief is unconstitutional would effectively have overruled *Weber* as Congress could not, by legislation, allow unconstitutional relief. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979) (holding that title VII does not condemn all private, voluntary, race conscious affirmative action); General Elec. Co. v. Gilbert, 429 U.S. 125, 145 (1976) (stating Congress made it unlawful for employer to discriminate on basis of sex and defining concept of discrimination according to tradition). The Supreme Court's decisions in *Local 638* and *Vanguards*, however, will address the title VII issue directly. *See supra* note 281 (discussing Supreme Court oral argument)

299. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

300. Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975).

301. Franks v. Bowman Transp. Co., 424 U.S. 747, 748 (1976).

302. *Id.* at 775.

303. *E.g.*, Ford Motor Co. V. EEOC, 458 U.S. 219, 239-40 (1982) (rejecting rule that compels innocent workers to sacrifice seniority to persons claiming unlawful discrimination); United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979) (permitting affirmative action plan that did not infringe on rights of white employees); Teamsters v. United States, 431 U.S. 324, 353-54 (1977) (concluding Congress did not intend to make it illegal for employees to exercise vested seniority rights).

tems against title VII charges.[304] The current trend also has curtailed affirmative action relief. The Court now permits affirmative action relief in only a few situations.[305] This Term, in *Wygant*, the Court decided not to abolish this remedy completely as unconstitutional.[306]

When examining the Supreme Court's resolution of the seniority-title VII conflict, it proves instructive to scrutinize the individual Justices' voting records. This conflict has included three major issues: (1) the extent of section 703(h)'s protection of seniority systems; (2) the viability of retroactive seniority relief under the Act; and (3) the balancing of right to equal employment opportunity under title VII and rights of seniority under collective bargaining agreements. The voting records of the particular Justices divide the Court into two groups: those who advocate the current trend towards a restrictive reading of title VII and those who support title VII's policy goals of equal employment opportunity.

The current majority advocates restricting the reach of title VII. Chief Justice Burger, along with Justices O'Connor, Rehnquist, and White, consistently vote to extend section 703(h)'s protection of seniority systems from claims of discrimination,[307] to limit retroactive seniority relief,[308] and to strike a balance in favor of seniority rights.[309] They reject the advancement in employment of the protected classes if it is at the expense of a white incumbent.[310]

In attempting to mediate the seniority-title VII conflict, Justice Powell has vacillated. He abstained in *Albemarle*,[311] concurred and

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304. *See, e.g.*, American Tobacco Co. v. Patterson, 456 U.S. 63, 65-66 (1982) (evaluating promotion system that separated white jobs from black jobs); United Steelworkers of Am. v. Weber, 443 U.S. 193, 197 (1979) (evaluating affirmative action plan granting blacks 50% of openings in training program); United Air Lines v. Evans, 431 U.S. 553, 555 (1977) (evaluating collective bargaining agreement that reinstated employees without seniority credit for prior services); Teamsters v. United States, 431 U.S. 324, 329-30 (1977) (challenging discriminatory collective bargaining agreement).

305. Since its decision in *Weber*, the Court consistently has ruled to extend § 703(h)'s protection of collective bargaining agreements against title VII charges. *See supra* notes 135-44 and accompanying text (discussing Court's expanded reading of § 703(h)).

306. *See supra* note 298 and accompanying text (analyzing *Wygant*).

307. *See, e.g.*, Pullman-Standard v. Swint, 456 U.S. 273, 289 (1982) (requiring actual intent to discriminate before limiting § 703(h) protection of seniority system); American Tobacco Co. v. Patterson, 456 U.S. 63, 75-77 (1982) (extending § 703(h)'s protection beyond holdings in *Teamsters* and *Evans*).

308. *See* Ford Motor Co. v. EEOC, 458 U.S. 219, 241 (1982) (holding that offer of retroactive seniority was not necessary to toll back pay liability).

309. *See* American Tobacco Co. v. Patterson, 456 U.S. 63, 78-79 (1982) (Brennan, J., dissenting) (criticizing Court's extension of § 703(h) protection of nonminority rights which resulted from past discrimination).

310. *See* Pullman-Standard v. Swint, 456 U.S. 273, 277 (1982) (stating that § 703(h) protects seniority system even if it perpetuates effects of pre-Act discrimination).

311. Albemarle Paper Co. v. Moody, 422 U.S. 405, 407 (1975).

dissented in *Franks*,[312] joined the majority in *Teamsters* to extend section 703(h) protection of seniority systems,[313] and abstained in *Weber*,[314] where the Court supported affirmative action programs. Since 1981, however, he has voted with the current Court's majority.[315] He believes that only benefit-type seniority, as compared with competitive seniority, is appropriate relief under title VII. As he stated in *Franks*, the rights of innocent employees should be the controlling equitable consideration precluding competitive seniority; minorities should not be granted preferential treatment.[316]

Justice Stevens promotes the extension of section 703(h)'s protection of seniority systems.[317] He also tends to read the Act restrictively in deciding the extent of allowable relief.[318] He cannot be said to vote on "policy" or for nonminority rights as he votes on his own view of the controlling law, which often results in his being a swing vote.[319]

On the other hand, the current minority, comprised of Justices Blackmun, Brennan, and Marshall, advocates pursuing title VII's policy goals of providing equal employment opportunities. Justices Marshall and Brennan consistently have attempted to limit the protection of seniority systems under section 703(h).[320] They have urged that the Act should reach systems that lock in the effects of past discrimination and have argued that the legislative history of the Act does not support the interpretation that section 703(h) insulates seniority systems that have a discriminatory impact.[321] They

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312. Franks v. Bowman Transp. Co., 424 U.S. 747, 781 (1976).

313. International Bhd. of Teamsters v. United States, 431 U.S. 324, 328 (1977).

314. United Steelworkers of Am. v. Weber, 443 U.S. 193, 195 (1979).

315. *See, e.g.*, W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 758 (1983) (joining Justice Blackmun's unanimous opinion); Pullman-Standard v. Swint, 456 U.S. 273, 275 (1982) (joining White's majority opinion); American Tobacco Co. v. Patterson, 456 U.S. 63, 64 (1982) (joining White's majority opinion).

316. Franks v. Bowman Transp. Co., 424 U.S. 746, 786-93 (1976).

317. *See, e.g.*, American Tobacco Co. v. Patterson, 456 U.S. 63, 88 (1982) (Stevens, J., dissenting) (describing affirmative defense for employer with bona fide seniority system that appears to discriminate); United Air Lines Inc. v. Evans, 431 U.S. 553, 560 (1977) (stating that § 703(h) and labor policy preclude invalidation of facially neutral seniority system, regardless of its discriminatory effects).

318. *See* American Tobacco Co. v. Patterson, 456 U.S. 63, 86-88 (1982) (Stevens, J., dissenting) (criticizing Court's 'strained' reading of statute).

319. *See* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2594 (1984) (Stevens, J., concurring) (concluding that administration of consent decree, not title VII, governs disposition of instant case).

320. *See* American Tobacco Co. v. Patterson, 456 U.S. 63, 78-79 (1982) (Brennan, J., dissenting) (criticizing Court's extension of § 703(h)'s scope of protection as inconsistent with statute).

has resolved the balance in favor of seniority rights, effectively impeding minorities' advancement in employment in contravention of the purposes of the Act.[337]

Another factor that must be considered in the employment context is labor market forces. The argument against disturbing the existing status of employees is that the market principally determines employment opportunities and resulting distributive outcomes.[338] Economic forces in a market do not act independently of the people who make the market function. People do not divorce themselves from their personal ideologies when they make employment decisions. Thus, marketplace statistics merely reflect the views of those who make the decisions.[339] Title VII rendered illegal the conscious or subconscious use of racist or sexist ideologies in making employment decisions so that the protected classes would be afforded equal employment opportunities.

Blacks and women, historically, have been excluded from equal participation in the marketplace. Congress, in enacting title VII, intended to remedy this historic exclusion. Congress recognized the need to provide broad relief to the group that suffered historic wrongs in order to eliminate existing practices and to correct the impact of past practices.[340] The Supreme Court in its decision in *Weber* also recognized that the need to remedy past discrimination was sufficient justification for accepting voluntary quotas when they do not unnecessarily interfere with nonminority workers' rights.[341] If the Supreme Court in *Wygant* declares that this affirmative relief is unconstitutional, it will effectively perpetuate the historical exclusion of minorities from equal participation in the marketplace. Such a result could not have been Congress' intent when it enacted title VII.

Statistics on employment suggest that race and gender are still criteria for discriminatory treatment in employment. Blacks and women are still underrepresented in the professional fields and over-

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gained agreements, which are accepted by a majority of votes, adequately to protect their interests.

337. *See supra* notes 303-05 and accompanying text (describing Court's shift towards protection of seniority rights at expense of minorities' equal employment opportunity rights).

338. Fallon & Weiler, *supra* note 9, at 15 n.64.

339. *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 1981 REPORT: JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY, I-1 (1984) (Table 1) (showing that 81% of total participants in labor market were white and 11.4% were black).

340. *See supra* notes 30-37 and accompanying text (discussing goals of title VII legislation).

341. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 201-04 (1979) (discussing propriety of race-conscious affirmative action plan voluntarily adopted to eliminate traditional patterns of racial segregation).

represented in blue collar and clerical jobs.[342] Figures also indicate that today, over twenty years after the passage of antidiscrimination in employment laws, blacks still bear the burden of unemployment in the labor market, with an unemployment rate consistently at least twice that of whites.[343]

The marketplace, in theory, is a meritocracy. It is difficult, however, to accept that employment statistics reflect race or gender neutral hiring. Rather, the statistics make a strong case for the existence of discriminatory employment practices, which seniority systems serve to perpetuate. The current Supreme Court majority's view fails to consider these factors and further entrenches the ills title VII sought to cure.

CONCLUSION

Racism and sexism exist today as unmeasurable social factors, as an unpleasant social reality. However, they are illegalities based on which no person's livelihood should depend; title VII mandates as much. The conflict between civil rights and seniority rights represents a clash of two objectives: job security and equal employment opportunity. In the employment game, innocent individuals are forced into competition with one another. One ends up in the winner's position and the other in the loser's position.[344] The conflict must be resolved fairly, yet one individual still must suffer a loss. The question becomes one of loss allocation[345] and of legal force to implement the allocation.

Title VII supplies the legal force in this socioeconomic context. It requires the termination and also the correction of existing wrongs. The law allocates the risk of loss to the nonminority group which, through its prejudices, impeded the progress of the statutorily pro-

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342. *See supra* note 338 (showing "Participation Rate" in labor market and "Occupational Distribution").

343. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, MONTHLY LABOR REVIEW 4 (1985). At the end of 1982, when whites were facing a 9.4% unemployment rate, blacks were facing a 20.5% unemployment rate. *Id.* At the end of 1983, the unemployment rates for whites and blacks, respectively, were 7.3% and 17.8%; and at the end of 1984 the figures were 6.2% and 15.1%, respectively. *Id.* After the second quarter of 1985, white unemployment was 6.3% and black unemployment was 15%. *Id.*

344. Also, the persons competing for a position generally will not volunteer to take the loss. L. THUROW, *supra* note 1, at 11.

345. *Id.* at 12. Some suggest that job-sharing is a good solution, but this is costly in terms of rewards and resources. *See supra* note 331 (discussing alternatives to layoffs). Perhaps an easy and too-obvious solution is for the employer to bear the burden. As in W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757 (1983), the employer must bear the burden of the dilemma he or she caused. This solution may be futile and economically inefficient, however, if the employer does not have sufficient economic resources available to satisfy employees' claims.

tected minorities. Until the marketplace is freed of prejudice, those who have, by their prejudices, created an unfair advantage for themselves must bear the burden of removing the constraints.

In order to effectuate the purposes of the Act, affirmative action relief must be available to title VII claimants. The rightful place doctrine is a step in the right direction that also serves to protect the interests of the majority employees. Courts can supplement this doctrine to include other compensation for discriminatory treatment, exclusive of displacement of white male incumbents. For example, applying the standard in *Griggs* to seniority systems that perpetuate the effects of past discrimination accommodates both the vested rights of the majority employees and the statutory rights of the protected classes. In addition, voluntary self-regulation by employers for compliance with title VII, and in furtherance of its goals via affirmative action plans, provides a means of promoting equal employment opportunities. If those obligations conflict with existing collective bargaining agreements, *Grace* places on the employer the risk of loss, because it entered into conflicting contractual obligations.

The current administration's position that an acceptable affirmative action plan must be nondiscriminatory[346] is an intrinsically contradictory concept. It makes a mockery of the principles of equality title VII sought to promote. In a society divided by race and gender, as is evidenced by minorities' positions in the labor force, it is hypocritical and naive to ignore the continuing existence and effects of discrimination. The protected classes must be allowed the opportunities that they have been denied throughout our nation's history. To require blindness to their handicap tortures the notion of equality. The only way to eliminate this inbred disparity is to recognize its immoral existence and take affirmative steps to eradicate it.

Until we are an unbiased society with respect to race and gender, courts must have broad powers to correct employment conditions that reflect racial or gender biases. This is the minority position in the present Supreme Court, but it is the only stance that will effectuate the letter as well as the spirit of title VII. In the words of Justice Thurgood Marshall: "In light of the sorry history of discrimination and its devastating impact on the lives of Negroes [and women], bringing the Negro [and women] into the mainstream of American life should be a state interest of the highest order. To fail to do so is

346. Address of the Honorable Edwin Meese III, Attorney General of the United States to Students and Faculty of Dickinson College 10 (Sept. 17, 1985).

to ensure that America will forever remain a divided society."[347]

347. Regents of the University of Cal. v. Bakke, 438 U.S. 265, 396 (1978) (Marshall, J., concurring).